146 U.S. 483

RECORD, CASE No. 13,601.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 66.

LA COMPANIA BILBAINA DE NAVEGACION, DE BILBAO, APPELLANT,

vs.

THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, CONSOLIDATED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 12, 1889.

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1 District Court of the United States, Southern District of New York. In Admiralty.

LA COMPANIA BILBAINA DE NAVEGACION, DE BILBAO,
vs.
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated.

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of La Compania Bilbaina de Navegacion, de Bilbao, owners of the Spanish steamship "Marzo," of Bilbao, against the Spanish-American Light and Power Company and the Spanish-American Light and Power Company, Consolidated, in a cause of contract, civil and maritime, respectfully alleges and shows as follows, viz:

First. That La Compania Bilbaina de Navegacion, de Bilbao, is
2 a company duly organized under the laws of the Kingdom of Spain, having its principal office in Bilbao, in said kingdom, and is the sole owner of the Spanish steamship "Marzo," and that said company was such owner during all the times and occurrencies hereinafter stated and set forth.

Second. That said Spanish-American Light and Power Company on or about the 14th day of December, 1885, was a corporation duly organized under the laws of the State of New York, having its principal office in the city of New York and within said southern district of New York.

That since that date the said corporation has become consolidated with the Havana Gas Light Company, another corporation duly organized under the laws of the State of New York, under the name of the "Spanish-American Light and Power Company, Consolidated," and under the laws of said State, as well as by the articles of consolidation between the two said corporations, the "Spanish-American Light and Power Company, Consolidated," has become possessed of all the assets and property and has assumed and become liable for all the debts, liabilities, and contracts of the said Spanish-American Light and Power Company, among which contracts and liabilities are the charter party and liabilities arising thereunder hereinafter to be mentioned.

Third. That said Spanish-American Light and Power Company and Spanish-American Light and Power Company, Consolidated, have their principal places of business within the southern district of New York and are within the jurisdiction of this honorable court.

Fourth. That on the 14th day of December, 1885, the said Spanish-American Light and Power Company, through its agents and
3 brokers, James E. Ward & Co., were in treaty with your libellant company, represented in New York by W. W. Hurlbut, who was acting by cable authority of Walker, Donald & Taylor, the brokers, at London, England, of said libellant com-

pany, for a charter of the said steamship "Marzo" for the term of twelve calendar months.

That on that day a charter party (a copy of which is hereto annexed, marked "Exhibit A") was concluded upon in substance between said brokers.

That Messrs. James E. Ward, as brokers aforesaid, were desirous to secure for their said principals (the Spanish-American Light and Power Company) an option of continuing the said charter for the term of twelve months from its expiration, and also a privilege of using the "water-ballast tanks" of said steamship for carrying petroleum in bulk therein, and were desirous that said W. W. Hurlbut, as broker aforesaid, should agree on behalf of said owners to give said option and privilege, and also that said W. W. Hurlburt, as broker aforesaid, should agree on behalf of said owners what said water-ballast tanks should be fitted for said purpose at the said "owners' expense satisfactory to said charterers."

But the said W. W. Hurlbut, as broker aforesaid, at all times stated to said James E. Ward & Co., brokers as aforesaid, that he, said Hurlbut, had no authority from said owners or their London brokers to grant said option of continuance or to agree that said owners should so fit said water-ballast tanks at the expense of said owners, and that he, said Hurlbut, was of the opinion that said owners would not agree to said option and would require the charterers to pay the expense of fitting the tanks should they desire to use them for the purpose of carrying petroleum in bulk therein.

That after much negotiation and at the request of Messrs. James E. Ward, brokers as aforesaid, it was finally agreed that said option should be inserted in the charter party, as the same appears
4 in clause 11 thereof, and that the privilege of carrying petroleum in bulk in *in* the water-ballast tanks of said vessel should also be inserted as the same appears written in clause 18 thereof, upon the distinct understanding and agreement, nevertheless, that said option (clause 11) and the words "at owners' expense" (clause 18) should be so inserted subject to the approval of said owner, your libellant company, and without such approval and until the same should be expressly approved by your said libellant company said option (clause 11) and the words "at owners' expense" (clause 18) should be inoperative and of no effect and should be treated in all respects as though the same had never been inserted in said charter party.

It was further also agreed that a pencil memorandum of said agreement made at the time should be reduced to writing and sent with the charter party (at the time the copies of the same should be sent) to the said James E. Ward & Co., brokers aforesaid, and be considered a part of said charter party.

Fifth. The said charter party, although dated December 14th, 1885, was not, in fact, signed until December 19th, 1885, and on the last-named day the said W. W. Hurlbut, who signed the same (as said charter party shows) by cable authority of the Messrs. Walker, Donald & Taylor, the London brokers of your libellant company

addressed to the said Spanish-American Light and Power Company a letter in the words and figures following, viz.:

NEW YORK, *December* 19*th*, 1885.

Spanish-American Light and Power Co., charterers S. S. "Marzo."

DEAR SIRS: I have signed charter party by authority con-
5 tained in cables received. Should the two clauses, viz., "privilege 'of twelve months' extension and the fitting of ballast tanks for petroleum at owners' expense' not be accepted by owners, it is understood that the same may be arranged or compromised by mutual consent by cable."

Yours truly, W. W. HURLBUT.

And on December 21st, 1885, three copies of said charter party (with said letter of 19th attached) were delivered to Messrs. James E. Ward & Company, as brokers aforesaid, accompanied by a letter in the words and figures following, viz:

NEW YORK, *December* 21*st*, 1885.

Messrs. J. E. Ward & Co., city.

DEAR SIRS: I enclose three certified copies charter party S. S. "Marzo;" also the letter for charterers to accept, covering the two conditions inserted in charter party, as understood on signing the same.

Yours truly, W. W. HURLBUT.

Sixth. That as soon as the terms of said charter party were made known to your libellant company they immediately, viz., on the 4th day of January, 1886, by letter addressed to their said London brokers, disapproved of the insertion of said option (clause 11) and of the insertion of the words "at owners' expense" in clause 18, which said refusal to approve the same was immediately, by said London brokers, sent out to New York, and a copy of said letter and disapproval was delivered by said W. W. Hurlbut to Messrs. James E. Ward, brokers as aforesaid, on the 18th day of January, 1886, at which date the said steamship "Marzo" was on the passage
6 from Bilbao to Philadelphia, at which latter port she duly arrived; and on the 20th day of February, 1886, the said steamship was delivered to the said charterers, who accepted her with full knowledge that your libellant company had refused to confirm the said two clauses (eleven and eighteen) of the charter party, and more than a month after their said letter of January 4th, 1886, refusing to be bound by those clauses, had been delivered to the said charterers, and said charterers, without any claim or intimation of claim on their part that said refusal was not binding upon them, proceeded to load and did load the said steamship on two several voyages out to Cuba and return to the United States, which voyages were performed to the entire satisfaction of the said charterers.

Seventh. That on or about the 13th day of May, 1886, after the

said two voyages had been made, the said charterers, by their letter of that date, formally and for the first time notified the agents at New York of your libellant's company that said charterers intended to avail themselves of their privilege of shipping petroleum in bulk in said water-ballast tanks, and on the 17th of May, 1886, by letter, the said charterers notified said agents at New York that said water-ballast tanks must be fitted at owners' expense, to charterers' satisfaction, and until they were so fitted the charterers would refuse to pay hire for the said steamer.

Eighth. That after some delay the said vessel was again loaded by said charterers and sent by them on a third voyage to Cuba and return to the United States under a stipulation, signed by agents for the vessel and the charterers, that such loading and dispatching of the vessel should not prejudice the claims or rights of either party to the charter party, but said charterers refused to pay the hire due (May 21st, 1886), except the sum fifteen hundred dollars on account thereof.

7 Ninth. That upon the return of said vessel from the last-mentioned voyage the said charterers again demanded that said tanks should be fitted at owners' expense, whereupon the said agents at New York notified the said charterers that the said tanks would be fitted according to charterers' demand, but that the said charterers would be held liable for the expense of so fitting them, and accordingly the said tanks were so fitted (by said owners) under the supervision and directions of an engineer appointed by the said charterers.

Tenth. That the cost of fitting the said water-ballast tanks amounted to the sum of five thousand five hundred and twenty dollars and ninety-seven cents ($5,520.97), which sum your libellant company is entitled to recover from the said charterers, the Spanish-American Light and Power Company and their said successor, the Spanish-American Light and Power Company, Consolidated, with interest thereon from August 4th, 1886.

That payment has been demanded from said companies and refused.

Eleventh. That said Spanish-American Light and Power Company has failed and refused to pay any hire of said vessel from May 21st, 1886, to August 4th, 1886, on which last date it paid the sum of three thousand three hundred dollars, being the hire due July 20, 1886, and the sum of fifteen hundred dollars on account of hire due May 20, 1886, which was paid on the latter date.

What there is still due to your libellant company from said Spanish-American Light and Power Company and its successor, the Spanish-American Light and Power Company, Consolidated, the sum of one thousand eight hundred dollars, with interest thereon from May 21st, 1886; also the further sum of £675, being the sum of thirty-three hundred dollars, being for hire due June 20th,

8 1886, with interest thereon from June 21st, 1886; also the further sum of eight dollars and fourteen cents, being for interest on the sum of $3,300 from July 21st, 1886, to August 4th,

1886, all on account of hire of said steamship as per said charter party.

That payment of the said several sums has been demanded from said companies and refused.

Twelfth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore your libellant company asks that process according to the course and practice of this honorable court may issue, and that the said Spanish-American Light and Power Company, Consolidated, may be cited to appear and answer all and singular the premises, and that this honorable court will be pleased to decree the payment by said Spanish-American Light and Power Company and its said successor, the Spanish-American Light and Power Company, Consolidated, to your libellant company of the several amounts aforesaid, viz:

The sum of fifty-five hundred and twenty dollars and ninety-seven cents, the cost of fitting the said water-ballast tanks and interest thereon from August 4th, 1886	$5,520 97
The sum of eighteen hundred dollars and interest thereon from May 21st, 1886	1,800 00
The sum of thirty-three hundred dollars and interest thereon from June 21st, 1886	3,300 00
And the sum of eight dollars and fourteen cents, interest as aforesaid	8 14

9 Together with the costs herein, and that otherwise right and justice may be done in the premises.

LA COMPANIA BILBAINA DE NAVEGACION, DE BILBAO,
By LATASA & CO.

WHITEHEAD, PARKER & DEXTER,
Proctors for Libellants, 52 Wall Street.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry M. Cormack, being sworn, says that he is a member of the firm of Latasa & Co., the agents at New York of La Compania Bilbaina de Navegacion, de Bilbao, the libellant company in the foregoing libel named; that said company has its place of business within the Kingdom of Spain; that none of its officers are within the said southern district of New York; that he has read the foregoing libel and knows the contents thereof, and that the same are true as he verily believes.

HENRY M. CORMACK.

Sworn to before me on this 18th day of August, 1886.

EDWIN F. WRIGHT,
[L. S.] *Notary Public, N. Y. County* (135).

JAMES PARKER, *Advocate.*

10 District Court of the United States for the Southern District of New York.

Filed the 27th day of August, 1886.

Stipulation for Libellant's Costs. Entered into Pursuant to the Rules and Practices of this Court.

Whereas a libel was filed in this court on the — day of August, in the year of our Lord one thousand eight hundred and eighty-six, by La Compania Bilbania de Navegacion de Bilbao against the Spanish-American Light and Power Company and the Spanish-American Light and Power Company, Consolidated, for the reasons and causes in the said libel mentioned, and praying that said respondents should be cited to appear and answer to said libel, and for a decree against them in the several sums in said libel more particularly demanded; and the said libellant company and John S. Dodge, their surety, parties hereto, hereby consenting and agreeing that, in case of default or contumacy on the part of the libellant company or said surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars :

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the libellant company above named shall appear and answer to the cause and interrogatories and
11 shall pay all such costs as shall be awarded against said libellant company by this court or, in case of appeal, by the appellate court.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO,
By LATASA & CO.

JNO. S. DODGE.

Taken and acknowledged this 26th day of August, 1886, before me—

[SEAL.] EDWIN F. WRIGHT,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John S. Dodge, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York and State of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JNO. S. DODGE.

Sworn to this 26th day of August, 1886, before me—

[SEAL.] EDWIN F. WRIGHT,
Notary Public, N. Y. Co.

Recorded the — day of ——, 188–.

—— ——, *Clerk.*

12 EXHIBIT A OF LIBEL.

Time Charter Party.

William W. Hurbut, 144 Pearl street.
" Watkins Code."
Telephone, " John, 142."
Cable address, " Dogbastian."

This charter party, made and concluded upon in the city of New York the fourteenth day of December, 1886, between Messrs. Aznar & Astigawaga, agents for owners of the good screw steamship Marzo, of 1,347 tons gross register, and provided with proper certificates for hull and machinery, classed 100 A 1, British Lloyds, of 1,800 tons dead weight and — tons cubic capacity or thereabouts, exclusive of bunkers, which contain — tons of coal, and the Spanish-American Light and Power Co., merchants and charterers, witnesseth:

That the said Aznar & Astigawaga agree to let and the said Spanish-American Light & Power Co. agree to hire the said steamship for the term of twelve calendar months from the — day of ——, she being then placed at the disposal of the charterers, at New York or Philadelphia, owners option, in such dock, or at such wharf or place (where she may always safely lie afloat) as charterers may direct, she being then tight, staunch, strong, and every way fitted for the service (and with full complement of officers, seamen, engine-rs, and firemen for a vessel of her tonnage), and to be so maintained during the continuation of this charter party; to be employed in such lawful trades between safe ports and/or ports in U. S. A. and/or West Indies and/or Gulf of Mexico and/or Central America and/or Caribbean sea, not south of the line and not north of St. Lawrence. To be em-

13 ployed in carrying lawful merchandise, including petroleum in barrels and/or cases, charterers to have option of cancelling this charter if ship does not arrive at port of delivery on or before the 20th day of February, 1886, as charterers or their agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all the provisions and wages and consular shipping and discharging fees of the captain, officers, engine-rs, firemen, and crew; shall pay for the insurance on the vessel; also for all engine-room stores and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for the service.

2. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated, and shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall, on expiration of this charter party, pay for all coal left in the bunkers, each at the current market prices at the respective ports when she is delivered to them.

Charterers to have option of cancelling this charter party should

the Government of the United States of America at any time impose differential duties on cargoes carried in Spanish steamers.

3. That the charterers shall pay for use and hire of the said vessel at the rate of six hundred and seventy-five pounds per calendar month, British stg. (£675), commencing on the day of her delivery at New York or Philadelphia, instant, and at and after the same rates for any part of a month; hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) at a port in U. S. A. north of Hatteras.

4. Payment to be made in cash, at the current rate of
14 sight exchange on London, monthly in advance, and in default of such payment or payments as herein specified the owners shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they, the owners, may otherwise have on the charterers in pursuance of this charter.

5. That the cargoes shall be laden $\frac{\text{and}}{\text{or}}$ discharged in any dock or at any wharf or place that charterers may direct where she can always safely lie afloat.

6. That the whole reach, burthen, and deck accommodation of the ship (not being more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, and stores.

7. That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew, tackle, and boats.

8. That the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners *from* all consequences or liabilities that may arise from the captain signing bills of lading or in otherwise complying with the same.

9. That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same and, if necessary, make a change in the appointments.

10. That the master shall be furnished from time to time with all requisite instructions and sailing directions and shall keep a full and correct log of the voyage or voyages, which are to be patent to charterers or their agents, and to furnish the charterers, their
15 agent or supercargo, when required, a true daily copy of log showing the course of the steamer and the distance run and the consumption of coal, and to take every advantage of wind by using the sails with a view to economize the expenditure of coal.

11. That the charters shall have the option of continuing the charter for a further period of twelve months on giving notice thereof to owners thirty days previous to first-named term, and to have the liberty of subletting the steamer if required by them.

12. That in the event of loss of time from deficiency of men or

stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and should she in consequence put into any other port other than that to which she is bound, the port charges and pilotages at such port shall be borne by the steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense.

13. That should the vessel be lost any hire paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers, with interest from date of loss, the act of God, the queen's enemies, fire, restraints of princes, rulers, and people and all and other dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation throughout the charter party always excepted.

15. That should any dispute arise between the owners and the charterers the matters in dispute shall be referred to three persons at New York—one to be appointed by each of the parties hereto and the third by the two so chosen. Their decision, or any two of them, shall be final, and for the purpose of enforcing any award this agreement may be made a rule of court.

16. That the owners shall have a lien upon all cargoes and all subfreights for freight or charter money due under this charter, and charterers to have a lien on the ship for all moneys paid in advance and not earned.

17. Steamer to work night and day if required by charterers, and all steam winches to be at charterers' disposal during loading and discharging, and steamer to provide men to work same both day and night, as required, charterers agreeing to pay for any night work incurred.

18. Should steamer be employed in tropical waters during the term of said charter party, steamer is to be docked and bottom cleaned and painted, if charterers think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in a proper state for the service; charterers to have the privilege of shipping petroleum in bulk in water-ballast tanks, which are to be fitted for the purpose at owner's expense, satisfactory to charterers, and have permission to appoint a supercargo at their expense, who shall accompany steamer, and be furnished free of charge with first-class accommodations, and see that voyages are made with utmost dispatch.

19. The benefit of all derelicts and salvages, as well as the loss of time and other expenses attendant thereon, to be for account of owners and charterers equally; penalty for non-performance of this contract, estimated damages; this charter subject to an address commission of (two) 2%, payable to J. E. Ward & Co.

20. Commission of five per cent. on the estimated amount of freight is due and payable by owners, on signment hereof, to W. Hurlbut, New York, ship lost or not lost, as also on any extension or renewal of this charter or purchase of vessel.

17 I certify this is a true copy of original charter party on file at N. Y. office.

By cable authority of—
WALKER, DONALD & TAYLOR, *London.*
(Signed) W. W. HURLBUT, *Agent.*
SPANISH-AMERICAN LIGHT & POWER CO.
(Signed) J. DEL CALVO, *Pres't.*
(Signed) R. C. A. SMITH, *S'c'y.*

Witness to the signature of W. W. Hurlbut:
A. C. DUNN.

Witness to the signature of Spanish-American Light & Power Co.:
W. D. MUNSON.

The President of the United States of America to the marshal of the southern district of New York, Greeting:

Whereas a libel has been filed in the district court of the United States of America for the southern district of New York on the 27th day of August, in the year of our Lord one thousand eight hundred and eighty-six, by La Compania Bilbaina de Navegacion, de Bilboa, against the Spanish-American Light and Power Company and the Spanish-American Light and Power Company, Consolidated, in a certain action, civil and maritime, for breach of charter party and hire therein alleged to be due and owing the said libellant, amounting to ten thousand six hundred and twenty-nine $\frac{11}{100}$ dol-
18 lars, and praying that a citation may issue against the said respondents, pursuant to the rules and practice of this court: Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you cite and admonish the said respondents, if they shall be found in your district, that they be and appear before the said district court on the thirty-first day of August, 1886, at the United States court-rooms, in the post office building, in the city of New York, then and there to answer the said libel and to make their allegations in that behalf; and you have then and there this writ, with your return thereon.

Witness the Hon. Addison Brown, judge of said court, this
[L. S.] 27th day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh.

SAM'L H. LYMAN, *Clerk.*

WHITEHEAD, PARKER & DEXTER, *Proctors.*

I hereby certify that on the 28th day of August, 1886, at the city of New York, in my district, I personally served the within citation upon the within named, The Spanish-American Light and Power Company and the Spanish-American Light and Power Company, Consolidated, by exhibiting to J. del Calvo, president of said com-

pany, the within original and at the same time leaving with him a copy thereof.

Dated August 28th, 1886.

M. T. McMAHON,
United States Marshal, Southern District of New York,
By GEO. H. HOLMES, *Deputy.*

19 District Court of the United States, Southern District of New York. In Admiralty.

LA COMPANIA BIBANIA DE NAVEGACION, DE BILBAO,
vs.
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated.

We hereby consent that Messrs. Wingate and Cullen be substituted in our place and stead as proctors for the libellees herein, and that an order to that effect may be entered without further notice to us.

Dated New York, September 18th, 1886.

DE FOREST & WEEKS,
Proctors for Libellees.

Ordered accordingly.
September 24, 1886.

ADDISON BROWN.

20 U. S. District Court, Southern District of New York.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO
against
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and The Spanish-American Light and Power Company, Consolidated.
} Notice of Appearance.

SIR: Please to take notice that the defendant, The Spanish-American Light and Power Company, Consolidated, appears in this action, and that we — retained as attorneys for it therein, and demand that a copy of all papers in this action be served on us at our office, number 20 Nassau street.

New York, September 23, 1886.

Yours, &c., WINGATE & CULLEN,
Attorneys for Defendant, 20 Nassau Street, New York.

Office No. and post-office address.

To —— ——, Esq., plaintiff's attorney.

21 District Court of the United States, Southern District of New York.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO
vs.
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated.

To the Hon. Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of the Spanish-American Light and Power Company, Consolidated, to the libel and complaint of La Compania Bilbaina de Navegacion de Bilbao in a cause of contract, civil and maritime, alleges as follows:

First. That this defendant is ignorant of the allegations in the first article of the libel, and therefore denies the same.

Second. This defendant admits the allegations contained in the second article of said libel, except that it denies that it is liable under said charter party for any of the causes set forth in said libel.

Third. This defendant admits and alleges that the said Spanish-American Light and Power Company, prior to its consolidation, had its principal place of business within the southern district of New York and within the jurisdiction of this honorable court, and the Spanish-American Light and Power Company, Consolidated,
22 since such consolidation has had and still has its principal place of business within said district.

Fourth. This defendant denies all the allegations contained in the fourth, fifth, sixth, seventh, eighth, and ninth articles of the libel, except in so far as they may be consistent with the facts hereinafter set forth.

Fifth. This defendant has no knowledge or information sufficient to form a belief as to whether the cost of fitting the water-ballast tanks in said steamer Marzo amounted to the sum of five thousand five hundred and twenty dollars and ninety-seven cents, as alleged in said libel or otherwise, and it leaves the libellant to make such proof thereof as it may be advised. This defendant denies that the libellant company is entitled to recover the same or any part thereof from either the Spanish-American Light and Power Company or their successor, the Spanish-American Light and Power Company, Consolidated.

Sixth. It admits that payment of said sum has been demanded of said company and refused.

Seventh. This defendant admits that the said Spanish-American Light and Power Company and its successor has refused to pay any hire of said steamer Marzo from May 21st, 1886, to August 4th, 1886, except that on May 20th it paid the sum of fifteen hundred dollars, and on July 20th, 1886, it paid the sum of thirty-three hundred dollars.

Eighth. Defendant denies that any sum whatever is due to the libellant from the Spanish-American Light and Power Company or

from its successor, the Spanish-American Light and Power Company, Consolidated.

23 Ninth. This defendant, further answering, alleges that it is informed and believes that during the months of November and December, 1885, negotiations were in progress in the city of New York between Mr. McDonald, of the firm of Walker, McDonald & Taylor, of London, and W. W. Hurlbut, representing the owners of the steamer Westphalia, and Henry P. Booth, representing the firm of James E. Ward & Company, and William D. Munson, looking towards the charter of the steamer Westphalia by the said Munson and said Ward & Company, and the fitting up of her ballast tanks at the expense of the owners of said steamer for the purpose of carrying oil in bulk. These negotiations having fallen through, the said W. W. Hurlbut offered the steamer Marzo as a substitute to the said Henry P. Booth at six hundred and seventy-five pounds a month to carry oil in the same manner; that the said offer was received by said Booth with the expectation that if the steamer were chartered at all it would be by said Munson, and that the firm of James E. Ward & Company would have an interest in such charter, their idea being to make the charter, provided they could first arrange with the Spanish-American Light and Power Company to freight out their oil and coal to Havana on such steamer, they knowing that said company were desirous of securing a steamer to carry petroleum in bulk; that this defendant was not informed and knew nothing of these facts.

Tenth. That said James E. Ward & Co., having applied to this defendant in regard to the matter, were informed by it that it would make no arrangements other than by chartering a steamer on its own account to carry its oil in bulk. Thereupon said firm offered said steamer Marzo to it for charter, representing that it was fit for the purpose and could be secured for £675 a month; that

24 this defendant thereupon asked said firm to ascertain what kind of a charter could be obtained for said steamer.

Said firm thereupon obtained and submitted to this defendant a draft of a charter party, which this defendant is informed and believes was prepared by said Hurlbut; that the officers of this defendant objected to the form of the clause therein contained giving the company the option of transporting oil in water tanks and made some change therein and returned the same as so altered to said James E. Ward & Co., stating that if a charter party of said steamer was to be executed to the defendant in the form as so altered it would accept it.

Eleventh. That the said charter as so altered by this defendant was delivered by said James E. Ward & Company to said Hurlbut; that said Hurlbut objected to the wording of the clause in question, as made by this defendant, but stated that he would draw a clause which would be satisfactory to him, and which would also suit the company; that he thereupon prepared a charter party and delivered it to said James E. Ward & Co., who took it to this defendant, by whom it was duly executed on the 14th of December, 1885, thus rendering the contract complete according to the custom

of merchants in the city of New York; that this defendant believes that the copy annexed to the libel and marked "A" is a copy of the charter party executed by it, but for greater certainty prays leave to refer to the original on the trial; that said charter party after being signed by this defendant was by them on the same day delivered to said James E. Ward & Co., who delivered it to said Hurlburt, who signed it and has since retained it, as is customary among merchants.

That a few days thereafter several copies of said charter party, duly signed by said Hurlbut, but without any letter or other communication, verbal or written, were received by this defendant.

25 Twelfth. That neither said Booth nor said James E. Ward & Co. were the agents or representatives in this transaction or any part thereof of the said Spanish-American Light and Power Company.

Thirteenth. That after the delivery of the steamer and after the controversy between the owners of said ship and this defendant in regard to the clause in question had arisen the latter was informed for the first time that after said Hurlbut signed said charter party he had stated to said James E. Ward & Company that the owners of said ship might object to the ten months' extension clause and to fitting up the tanks, but that Mr. McDonald, who was just sailing for England, would see them and explain the matter and would cable if there was any trouble, and if there was it would have to be arranged; and this defendant was then for the first time informed that the said W. W. Hurlbut, on the 21st day of December, 1885, delivered to James E. Ward & Company the letters of the 19th and 21st of December, which are set forth in the libel.

Fourteenth. This defendant, however, alleges that neither the said Booth nor the said James E. Ward & Company nor any other person had any authority from it to make any such agreement as is alleged in the libel or to consent upon its behalf to any other conditions or stipulations other than those which were contained in the charter party as executed by this defendant; that said James E. Ward & Company never delivered any such letters to this defendant.

That the clauses contained in said charter in regard to the twelve-month extension thereof, and particularly in regard to the fitting up the tanks of said steamer at the owners' expense for the carriage of oil in bulk, which were contained in the said charter as

26 executed by this defendant, were regarded by this respondent and were of the utmost importance, and that the company would not have executed or accepted such charter or chartered said steamer unless such clauses had been inserted therein; that this fact was known both to said James E. Ward & Company and to said Hurlbut.

Fifteenth. This defendant further alleges that it has no knowledge or information sufficient to form a belief as to whether there was any agreement or understanding between said James E. Ward & Company or said Booth and said Hurlbut that a pencil mem-

orandum of said agreement made at the time should be reduced to writing and sent with the charter party to the said James E. Ward & Company at the time the copies of such charter party should be sent to them, or that the same should be considered a part of said charter party, as alleged in said libel, or otherwise. It also has no knowledge or information sufficient to form a belief as to whether any such pencil memorandum was in fact made, and alleges that, if the same was made, it was not attached to said charter party when the same was presented to this defendant for signature or when the same was signed by it, and that neither this company nor its officers or authorized agents ever had any knowledge thereof or assented in any way to any such agreement or modification.

Sixteenth. This defendant has no knowledge or information sufficient to form a belief as to whether, as soon as the terms of said charter party were made known to libellants or on the 4th day of January, 1886, or at any other time, they immediately, by letter addressed to their London brokers or otherwise, disapproved of the insertion of said option in clause 11 of the said charter party or of the insertion of the words "at owners' expense" in clause
27 18, or that said refusal to approve the same was immediately by said London brokers sent out to New York or elsewhere, or that a copy of said letter and disapproval or of either thereof was delivered by said W. W. Hurlbut to Messrs. James E. Ward, brokers as aforesaid, on the 18th day of January, 1886, as alleged in the libel or otherwise.

Seventeenth. This defendant further alleges that the employment of the said James E. Ward & Company as brokers ceased on December 14th, 1885, at the time of the execution and delivery of the said charter party by this respondent; that even if such an agreement or understanding had been made between said Ward & Company and said Hurlbut, as is alleged in said libel, "that the option in clause 11" and the words "at owners' expense" in clause 18 should be inserted subject to the approval of the owners of said vessel; that it was the duty of said owners to promptly and directly notify this defendant of their disapproval thereof; that the said steamer Marzo arrived at the port of Philadelphia shortly before February 20, 1886, and was on that day tendered to and accepted by this defendant under said charter; that at that date this defendant had not been informed and was not aware that the owners of said ship objected in any way to any of the clauses which are contained in the charter party or questioned the authority of the agents executing the same so to do; that, on the contrary thereof, when the vessel was delivered to this defendant at Philadelphia as aforesaid the master thereof and Messrs. Latasa & Company, the agents of the owners, demanded from this defendant the sum of six hundred and seventy-five pounds as the payment due under said charter party at the time of said delivery, as provided in paragraph 3 of said charter, and that on that occasion the following cablegram sent by the agents of said
28 vessel named in said charter to said firm was exhibited by the latter to this defendant, namely:

"BILBOA, *February 18th*, 1886.

"Latasa, New York:

"Collect six hundred and seventy-five pounds a month according to contract. Remit by letter to London.

"AZNAR."

That a question having arisen between said Latasa and this defendant as to whether the date of the delivery of said vessel should be considered as commencing February 20, 1886, the same being Saturday, or an Monday, the 22d, the following receipt for such payment was endorsed by the former upon one of the certified copies of said charter sent to this defendant by said Hurlbut as above stated:

"Received, New York, February 20, 1886, from the Spanish-American Light & Power Company, the sum of three thousand and three hundred and four and $\frac{12}{100}$ dollars for a total of six hundred and seventy-five pounds, this being the first monthly instalment per charter party, said payment being made by it and accepted by us on condition that the owners and charterers shall settle the question of the date of delivery between themselves whether it shall commence to-day or Monday, the 22d inst. By cable authority from Messrs. Aznar & Astigaragal to collect.

"LATASA & COMPANY."

That otherwise than by raising the objection stated in said receipt said payment was demanded and was paid by this defendant in the belief that the charter party on which the same was indorsed was fully approved by the owners of said vessel.

29 Eighteenth. Defendant further alleges that ample time having elapsed since the transmission of a duplicate of said charter party to the owners of said vessels for them to inform this defendant of any want of authority of their agent to execute the same, and no intimation or suggestion being received by it from them that any such objection was made, and believing that none such existed, this defendant accepted the said steamer as of February 21, 1886, and proceeded to load and did load the same on a voyage to Cuba; that the clauses in said charter party contained, to wit, clauses 11 and 18, and particularly the provision in clause 18 that the charterers were to have the privilege of shipping petroleum in bulk in water-ballast tanks, which were to be fitted for the purpose at the owners' expense satisfactory to the charterer, were of great importance to this defendant, and that it would not have accepted the said vessel if it had been informed that the owners objected thereto or were unwilling to carry out the same.

This libellant further alleges that if, in fact, the said charter party was executed by said Hurlburt without authority from the owners as to any of the clauses therein contained there was no contract, as this libellant had never assented to any other charter than that which it had signed.

That if said owners desired to repudiate said charter for such reason they could only do so as a whole, and were therefore bound, before delivering said vessel and accepting payment under said

charter party, to make a new agreement for the hiring thereof; that even if the letter of said Hurlbut was binding said owners were bound, if they disapproved of said clauses, to arrange by cable with this libellant in relation thereto.

That their delivery of said steamer as above mentioned and acceptance of a payment under said charter was, therefore, a ratification of the said charter party as signed by this libellant and
30 now debars them from objecting to the authority of said Hurlbut to sign the same.

Nineteenth. That this defendant was not prepared to ship oil in bulk by said steamer upon its first voyage on account of its not having then completed its arrangements for that purpose; that such arrangements were completed in May, 1886; that at that time nothing had been done by the owners of said vessel to fit up the water-ballast tanks of said steamer so as to put them into condition to carry oil in bulk as provided by the said charter party, and the condition of the steamer was such that it was only able to carry the oil which this defendant was desirous of having transported when in barrels, a fact which was greatly limited in capacity; that this defendant, therefore, on May 17, 1886, notified Messrs. Latasa & Company, the agents of such owners, in writing that it was prepared to ship oil in bulk in the water-ballast tanks of the steamship Marzo, and that in accordance with the terms of the clause of the charter party the same were to be fitted up at the owners' expense satisfactory to it.

That until such tanks were put in the condition contemplated by said charter party the payment of the hire of said vessel would cease.

That on May 18, 1886, this defendant was notified by said agents that they had communicated with the owners, and that they refused to fit up such tanks.

That on May 19, 1886, this defendant notified said agents that it knew nothing of any other arrangement or provision than those which were contained in the charter party; that unless the tanks be fitted up for that purpose satisfactory to it it would hold the owners liable for any damage sustained by reason thereof, including the expense of chartering another vessel and any damage which it was subjected to by the delay. It further notified them that the
31 payment on account of said charter should cease until such tanks were fitted up in accordance with the provision of the charter.

Twentieth. That this defendant had previously purchased a quantity of crude petroleum, to be shipped in bulk in said tanks of said steamer, and that in consequence of the refusal of the owners thereof to fit up the same it was obliged to purchase barrels in which to ship the same; that this information having been communicated by it to said Latasa & Company, said firm, as the agents of said steamer, in a letter dated May 25, 1886, a correspondence took place, the result of which was that on May 28, 1886, it was agreed in writing between the said Latasa & Company as agents for said owners and this defendant that the said steamer should

proceed to load oil and coal for Havana pending the settlement of the matters in dispute between the owners and charterers without prejudice to the claims of either party, and that on such date this company paid said Latasa the sum of $1,500 as an advance on account of the above rent money pending settlement as per the above agreement.

Twenty-first. That this defendant thereupon was obliged to and did procure barrels and shipped the said oil in said steamer in said barrels, and in consequence thereof it was obliged to and did incur an expense of $2,000 more than would have been the cost if said oil had been shipped in bulk in said tanks; that pending such dispute said vessel was idle for a period of nine days and this defendant lost the use thereof.

Twenty-second. That upon the return of said vessel from the last-mentioned voyage this defendant again demanded that the said tanks should be fitted at the owners' expense for the purpose of carrying oil in bulk; that the said agents of New York notified
32 this defendant that the said tanks would be fitted according to the charterers' demand, but that the charterers would be held liable for the expense of so fitting them; that this defendant refused to consent to any such agreement, and finally, on June 26, 1885, it was agreed between the owners of said steamer and this defendant that the water-ballast tanks of said steamer should be at once fitted by the owners to the satisfaction of the charterers to carry petroleum in bulk, and that such fitting should not prejudice the claims of either party to said charter party, as the matter was then in dispute between them.

Twenty-third. That said steamer was delivered to the agents of said owners for the purpose of fitting up such tanks on July 3, 1886, and was accepted by them; that the work upon said tanks was not finished until the 5th day of August, 1886, when said steamer was returned to this defendant; that this defendant lost the use thereof during said thirty-three days.

Twenty-fourth. That the said owners have never fitted up the centre water-ballast tank for the carriage of oil in bulk and refuse to do so.

That, in consequence, its use is lost to the defendants.

That the capacity of said tank is about 50,000 gallons, and its loss reduces the value of said ship to the charterers in the sum of eleven hundred dollars a month from the 15th day of May, 1886, the date when this defendant required the same, making a damage of ten thousand and eighty-four ($10,084) dollars during the continuance of said charter.

Twenty-fifth. That from February 21, 1886, to August 27, 1886, the date of the commencement of this action, was one hundred and eighty-eight (188) days; that during said period this defendant was deprived of the use of said steamer, as above set forth, for forty-two days, leaving only one hundred and forty-six (146) days for which hire was due.

33 That such hire would, at the rate of £675 a month, amount to sixteen thousand and sixty ($16,060) dollars or there-

abouts; that this defendant has paid on account of the hire of said steamer during said period the sum above mentioned and other moneys, amounting together to fifteen thousand one hundred and thirty-seven ($15,137) dollars.

Twenty-sixth. That this defendant, as above shown, is entitled to deduct from the moneys due and to become due upon said charter the sum of two thousand three hundred and ninety ($2,390) dollars for the expense to which this defendant was put in procuring barrels for the purpose of transporting the oil which it had purchased to ship in bulk as aforesaid and for the charges connected therewith, and the further sum of ten thousand and eighty-four dollars ($10,084) for the damages which it will sustain by reason of the refusal of said owners to fit up said central ballast tank for the carrying of oil in bulk as above mentioned; that it has filed a cross-libel to recover from the libellants so much thereof as exceeds the hire of said vessel claimed in the libel herein.

Wherefore this defendant prays that the said libel may be dismissed.

That this honorable court will adjudge and decree that this defendant is entitled to offset against all moneys due and to become due under said charter party the above-mentioned sums, together with its reasonable costs herein.

SPANISH-AMERICAN LIGHT & POWER CO., CONSOLIDATED,
By R. A. C. SMITH, *Secretary.*

WINGATE & CULLEN,
Proctors for Defendant, No. 20 *Nassau Street, N. Y.*
GEO. W. WINGATE, *Advocate.*

34 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Robert A. C. Smith, being duly sworn, says that he is the secretary of The Spanish-American Light and Power Company, Consolidated, the defendant in the above-entitled action, which company has its place of business in the city of New York; that he has read the foregoing answer and knows the contents thereof, and that the same is true as he verily believes.

R. A. C. SMITH.

Sworn to before me this 23d day of September, 1886.
CHAS. T. CARRET,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

District Court of the United States for the Southern District of New York.

Filed the 23d day of Sept., 1886.

Stipulation. Entered into Pursuant to the Rules and Practices of this Court.

Whereas a libel was filed in this court on the 27th day of August, in the year of our Lord one thousand eight hundred and eighty-six, by La Compania Bilbaina de Navigacion de Bilbao against the Spanish-American Light and Power Company and the Spanish-American Light and Power Company for the reasons and causes in the said libel mentioned, and praying that process may issue against the defendants and Robert A. C. Smith and the Spanish-
35 American Light and Power Company, Consolidated, and the parties hereto hereby consenting, and that in case of default or contumacy on the part of the said defendant or its surety execution for the sum of one hundred dollars may issue against their goods, chattels, and lands;

And whereas also a claim has been filed in said cause by the Spanish-American Light and Power Company, Consolidated:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred dollars, conditioned that the defendant above named shall pay all costs and expenses which shall be awarded against it by the final decree of this court or, upon appeal, by the appellate court.

SPANISH-AMERICAN L. & POWER —,
CONSOLIDATED,
By R. A. C. SMITH, *Sec'y.*

R. A. C. SMITH.

Taken and acknowledged this 23d day of September, 1886, before me—

EDMUND D. HENNESSY,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Robert A. C. Smith, one of the parties to the above stipulation, being duly sworn, doth depose and say that he resides in the city of Brooklyn, 388 Clinton street; that he is worth the sum
36 of two hundred dollars over and above all his just debts and liabilities.

R. A. C. SMITH.

Sworn to this 23d day of September, 1886, before me—

EDMUND D. HENNESSY,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

Recorded the — day of ——, 188–.

—— ——, *Clerk.*

37 U. S. District Court, Southern District of New York. In Admiralty.

LA COMPANIA DE NAVIGACION DE BILBAO
vs.
SPANISH-AMERICAN LIGHT AND POWER COMPANY.

Whitehead, Parker & Dexter, for libellants; Wingate & Cullen, for respondents.

BROWN, *J.*:

The written charter party, signed by the broker of the libellants did not constitute a legal contract binding upon either of the parties, because in signing it the broker exceeded his authority,
38 and that fact was communicated at the time to the broker of the respondents. It was agreed between the brokers of each party, however, that if the clause relating to the extension of time to twelve months and the clause requiring the ship to fit up the oil tanks at her expense were objected to by the owners the matter should be settled by negotiation.

The respondents from the first refused the charter unless the ship should fit up the tanks at her expense, and that fact was stated to the libellants' broker at the time, and the owners of the ship in England subsequently refused to confirm the two clauses in the charter as proposed by the brokers. Notice of this refusal was given to the charterers and they never consented to waive these two clauses. The agreement of the brokers was that upon such a difference the matter should be settled by negotiation; but it never was settled. Neither side apparently wished to push the matter to a settlement, though each understood the difference. No agreement as to these two clauses was ever arrived at, while both deemed them material. The subsequent conduct of each shows that neither side receded or intended to recede from its position. When the vessel arrived ready for the first voyage neither party made inquiry as to the disputed clauses. The duty of inquiry rested upon each alike, if they wished to have a fixed agreement. Both, in fact, assented to the use of the ship on the first voyage without any definite agreement on the disputed points and without the settlement by negotiation that had been agreed on by the brokers. The charterers did not object because they were not ready to use tanks. When the respondents were ready to use the tanks and required the vessel to fit them up in pursuance of the terms of the charter the libellants refused to do so. The cargo was then taken in barrels under
39 a stipulation that that might be done without prejudice to the rights of either, the respondents claiming damages for the extra expenses. Subsequently the owners fitted up the tanks, claiming that the expenses would be at the charge of the charterers, while the latter notified the owners that they would not pay for any such expense.

As the written charter never became a binding contract as a whole for the total want of authority in the broker of the ship-owners to insert the two very material stipulations in question, and as the

charterers never agreed to accept the charter, except with those stipulations, and gave prompt notice thereof, and did nothing to mislead the owners, the charter party, as such, never became a binding contract upon either. It may be referred to, however, as fixing the rights of each in so far as it must be presumed to have been actually adopted by both parties in their subsequent acts and no further.

The owners' failure to notify the charterers directly for several weeks after the charter had been signed that they refused their assent to the two disputed clauses was irregular, and perhaps somewhat negligent on their part, but I do not think that material in the result because the charterers were, I think, apprised of the verbal refusal of the owners to those terms. Nevertheless, the vessel came to the charterers without further request by them, and was tendered to them by the owners without attempting any settlement of the disputed points. Both alike consented to the first voyage without any settlement of these differences. It is certain, however, that as soon as any question was made between the master and the charterers about the tanks after the first voyage the original refusal of the owners was made known to the respondents, and neither of the parties ever agreed to the demands of the other on this subject. Without either side yielding anything to the other as to the charter the ship was employed and neither side refused further dealings as they might have done.

Under that state of things the terms of the charter must be deemed to constitute the implied agreement of the parties in the actual use made of the ship, in all except as to the disputed clauses. Neither party can found any claim against the other upon the clauses that the other party did not accept, but always and consistently refused to accept, because in the face of such a refusal no agreement to them can be implied. The owners, therefore, can recover nothing for their expenditures in fitting up the tanks to carry oil in bulk, nor can the charterers by their cross-libel recover any damages for the tanks not being fitted up earlier. For the same reason also the owners cannot recover for any time of the vessel lost while they were fitting up the tanks. They lose nothing by this disallowance because it does not appear that any more time was required to fit up the tanks when the work was actually done than would have been required when the vessel was brought over to the charterers. The evidence shows that after the employment of the vessel had begun neither side was desirous of insisting on its legal right to discontinue all further service by reason of the failure of the parties to come to an agreement upon the disputed clauses of the written charter. The rights and liabilties of the parties are founded, as I have said, not at all upon the written charter party, but wholly upon their subsequent conduct in the actual use of the ship. The charter party is applied by implication to these acts so far as it presumptively indicates the intention of both and no further. There can be no implied promise or obligation in contradiction of the expressed refusal of either. The result is that neither has any claim upon the other for the damages set forth by them respectively, and the libel and

the cross-libel must, therefore, each be dismissed except as
41 respects the hire unpaid, if any, for the time of the actual use of the vessel by the charterers.

At a stated term of the district court of the United States of America for the southern district of New York held at the United States court-rooms, in the city of New York, on the 21st day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: Honorable Addison Brown, district judge.

LA COMPAGNIA BILBAINA DE NAVEGACION DE BILBOA
vs.
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated.

This cause came on to be heard and was argued by James Parker, Esq., advocate for the libellants, and George W. Wingate, Esq., advocate for respondents, and the court having advised thereon—

Now, on motion of Messrs. Whitehead, Parker & Dexter, proctors for libellants, it is hereby—

Ordered, adjudged, and decreed that libellants do have and recover from the respondents the sum of one thousand eight hundred dollars, being for balance hire unpaid for steamship "Marzo" for the month beginning May 21, 1886; also the further sum of one hundred and seventeen dollars, interest thereon from May 21, 1886; and also the further sum of ninety-five dollars and seventy-
42 & 43 three cents, being the costs of the libellants herein as duly taxed, the whole amounting to the sum of two thousand and twelve dollars and seventy-three cents ($2,012.73).

It is further ordered, adjudged, and decreed that unless this decree be satisfied or proceedings thereunder be stayed by appeal within the time and in the manner provided by law and the rules and practice of this court that the libellants have execution to enforce the same.

ADDISON BROWN.

Consent to the entry of the above is hereby given.

WINGATE & CULLEN,
Proctors for Respondents.

44 District Court of the United States, Southern District of New York. In Admiralty.

LA COMPANIA BILBAINA DE NAVEGACION, DE BILBAO,
ag'st
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated.

Please take notice that the libellant appeals from the final decree

entered herein on the 21st day of June, 1887, to the next circuit court to be held in and for said district.

Dated New York, June 30, 1887.

WHITEHEAD, PARKER & DEXTER,
Proctors for Libellant, 71 *Wall St., N. Y.*

To Samuel H. Lyman, Esq., clerk of said court.
Messrs. Wingate & Cullen, proctors for respondents.

45 United States District Court, Southern District of New York.

LA COMPANIA BILBAINA DE NAVEGACION, DE BILBOA,
vs.
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated.

SIRS: Please to take notice that the respondents hereby appeal from the final decree entered herein on the 21st day of June, 1887, to the next circuit court to be holden in and for the southern district of New York.

Dated June 24, 1887.

Yours, etc.,
WINGATE & CULLEN,
Proctors for Respondents.

To Whitehead, Parker & Dexter, proctors for libellants, 71 Wall street, New York.

SAMUEL H. LYMAN,
Clerk of the U. S. District Court.

46 Circuit Court of the United States, Southern District of New York.

LA COMPANIA BILBAINA DE NAVE-CION, DE BILBOA, Libellant and Appellant,
against
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated, Respondent and Appellee.
} Petition of Appeal.

To the honorable the circuit court of the United States for the southern district of New York:

The appeal of the above-named appellant, La Compania Bilbaina de Navegacion, de Balbao, respectfully shows—

That on or about the 27th day of August, A. D. 1886, the libellant and appellant herein exhibited its libel in the district court of the United States in and for the southern district of New York against the respondent and appellee, The Spanish-American Light and Power Company, Consolidated, claiming, for the reason in said libel set forth, that there was due to your appellant the following sums, viz.: The sum of $5,520.97 and interest thereon from August 4, 1886; the further sum of $1,800 and interest thereon from May 21, 1886; the further sum of $3,300 and interest thereon from June 21,

1886; also the further sum of $8.14, and that the said respondent might be condemned to pay the said several sums with costs.

That thereupon process in due form of law was issued and
47 duly served upon the respondent; whereupon, on the 23d day of September, 1886, said respondent appeared and filed its answer in said case, praying that the said libel be dismissed with costs to said respondent, all of which will more fully appear by reference to said libel, process, appearance, and answer.

That said cause came on to be heard on the 11th day of May, A. D. 1887, before the Honorable Addison Brown, judge of said district court of the United States for said southern district of New York, upon the pleadings and proofs adduced by the respective parties, and the said judge, having duly advised thereon, did on the 21st day of June, 1887, make an order or decree whereby it was, among other things, ordered and decreed that the libellant do recover against the respondent the sum of $1,800 and interest, as in said libel demanded and claimed, and that as to the other sums in said libel demanded and claimed the said libel be dismissed.

That the libellant and appellant herein is advised and claims that said final order and decree is erroneous, inasmuch as libellant and appellant was entitled to a decree for the said sums of $5,520.97 and $3,300 and $8.14 and interest, as in said libel more particularly set forth and claimed, in addition to the said sum of $1,800 and interest so decreed to it.

That this libellant and appellant appeals from so much of said decree as denies to it a decree for said several sums of $5,520.97, $3,300, and $8.14 and interest, as in said libel set forth and demanded and claimed, to the next term of the circuit court in and for said southern district of New York to be held in said district.

And on said appeal appellant intends to have the cause heard anew on the pleadings and proofs adduced in the said district court and other pleadings and proofs to be introduced in the circuit court.

Appellant therefore prays that the record and proceedings
48 of the district court may be returned to the circuit court, and that that part of said decree which denies to the said appellant its claim for the said several sums of $5,520.97 and $3,300 and $8.14 and interest, as in said libel claimed, may be reversed and held for naught, and that the respondent and appellee may be condemned to pay to your appellant the said several sums and interest, as in said libel claimed, and that such other order and decree may be made in the premises as to this honorable court may seem just.

And that appellant may have a decree for his costs and expenses of this appeal.

WHITEHEAD, PARKER & DEXTER,
Proctors for Appellants, 11 *Wall St., N. Y.*
JAMES PARKER, *Advocate.*

Know all men by these presents that we, La Compania Bilbaina de Navigacion de Bilbao and Stanley W. Dexter and James Parker, are held and firmly bound unto The Spanish-American Light & Power Company, Consolidated, in the sum of two hundred and fifty

dollars, to be paid to the said Spanish-American Light & Power Company, Consolidated, executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-first day of September, in the year of our Lord one thousand eight hundred and —.

Whereas La Compania Bilbaina de Navigacion de Bilbao, as appellant, has appealed to the circuit court of the United States
49 for the southern district of New York, in the second circuit, from a decree of the district court of the United States for the said southern district bearing date the — day of ——, 1887, in a suit in which said La Compania Bilbaina de Navigacion de Bilbao as libellant against said Spanish-American Light & Power Company, Consolidated, is appellee:

Now, therefore, the condition of this obligation is such that if the above-named appellant, La Compania Bilbaina de Navigacion de Bilbao shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against it as such appellant therein if it shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

LA COMPANIA BILBAINA DE NAVIGACION DE BILBAO, [L. S.]
By WHITEHEAD, PARKER & DEXTER,
Its Attorneys-in-Fact.
STANLEY W. DEXTER. [L. S.]
JAMES PARKER. [L. S.]

Sealed and delivered and taken and acknowledged this 21st day September, 1887, before me—

THOMAS F. MURTHA,
[L. S.] *Notary Public, N. Y. Co.*

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

James Parker and Stanley W. Dexter, being duly sworn, said Dexter doth depose and say that he resides in the southern
50 district of New York, and said Parker that he resides in the State of New Jersey, and each saith for himself that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAMES PARKER.
STANLEY W. DEXTER.

Sworn to this 21st day of September, A. D. 1887, before me—

THOMAS F. MURTHA,
[L. S.] *Notary Public, New York Co.*

This bond approved as to form and amount and sufficiency of surety.

Dated New York, Sept. 23, 1887.

WINGATE & CULLEN,
Attorneys for Respondents.

51 Circuit Court of the United States, Southern District of New York.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO, Libellant and Appellee,
against
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Consolidated, Respondent and Appellant.
} Petition of Appeal.

To the honorable the circuit court of the United States for the southern district of New York:

The appeal of the above-named respondent and appellant, The Spanish-American Light and Power Company, Consolidated, respectfully shows to this court that on or about September —, 1886, the above-named libellant exhibited its libel in the district court of the United States in and for the southern district of New York against the respondent and appellant, The Spanish-American Light and Power Company, Consolidated, claiming for the reasons in said libel set forth that there was due to said libellant from this respondent the demands of said libellant in said libel mentioned, and that said libel mentioned claimed more than the sum of fifty dollars, besides costs, and praying that this respondent might be condemned to pay the demands of the said libellant as in said libel claimed, with costs and interest; that process issued out of said court having been served on this respondent, it did, on or about the — day of ——, in the year one thousand eight hundred and eighty-six, file its
52 answer to the said libel in said cause in the said district court praying that the said libel be dismissed, with costs to this respondent; all of which will more fully appear by reference to said libel, process, appearance, and answer.

That the said cause came on to be heard before the Honorable Addison Brown, judge of said district court of the United States for said southern district of New York, upon the pleadings and proofs adduced by the respective parties; and the said judge, having duly advised thereon, did, on the 21st day of June, 1887, make an order, decree, or sentence in said cause whereby it was, among other things, ordered that the said libellant do recover against this respondent the sum of $1,800 and interest, as in said libel demanded and claimed, and that as to the other sums in said libel demanded and claimed the said libel be dismissed.

That this respondent and appellant herein is advised and claims

that said decree is erroneous, inasmuch as the said libel should have been therein dismissed with costs.

That this respondent and appellant for these and other reasons appeals from the whole of said decree to the next term of the circuit court in and for said southern district of New York, to be held in said district, and on said appeal appellant intends to have said cause heard anew upon the pleadings and proofs adduced in the said district court, together with other and additional pleadings and proofs to be introduced in the circuit court in behalf of this respondent and appellant.

And appellant therefore prays that the record and proceedings of the district court may be returned to said circuit court, and that that part of said decree which allows to the libellant and appellee the sum of $1,800 and interest may be reversed and held for naught, and that the libellant and appellee may be condemned to pay to your appellant its costs, and that such other order and decree may be made in the premises as to this honorable court may seem just.

53 And that appellant may have a decree for his costs and expenses of this appeal.

WINGATE & CULLEN,
Proctors for Appellant

GEORGE W. WINGATE, *Advocate.*

54 Know all men by these presents that we, the Spanish-American Light and Power Company, Consolidated, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the La Compania Bilbaina de Navigacion, de Bilbao, in the sum of twenty-five hundred
55 dollars ($2,500), to be paid to the said La Compania Bilbaina de Navigacion, de Bilbao, its successors or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of July, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the Spanish-American Light and Power Company, Consolidated, as appellant, has appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from a decree of the district court of the United States for the said southern district, bearing date the 21st day of June, 1887, in a suit in which the La Compania Bilbaina de Navigacion de Bilbao is the libellant against the Spanish-American Light and Power Company, Consolidated:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against them as such appellants therein if they shall fail to make such appeal good,

then this obligation shall be void; otherwise the same shall remain in full force and effect.

THE SPANISH-AM. L. & P. CO., [L. S.]
By H. W. DE FOREST, *V.-Pres.*
AMERICAN SURETY COMPANY,
By RICH. A. ELMER, *President.*
FRED. F. NUGENT, *Secretary.*

Signed, sealed, and delivered in the presence of—
Attest:
[L. S.] R. A. C. SMITH, *Sec.*
[L. S.] H. G. HINTON,
As to Am. S. Co.

56 CITY AND COUNTY OF NEW YORK, *ss:*

On this 29th day of July, 1887, before me personally appeared R. A. C. Smith, secretary of the Spanish-American Light and Power Company, Consolidated, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of Brooklyn; that he is the secretary of the Spanish-American Light and Power Company, Consolidated; that he knew the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as secretary of said company by like authority; and the said R. A. C. Smith further said that he is acquainted with H. W. de Forest and knew him to be the vice-president of said company; that the signature of the said H. W. de Forest subscribed to the said instrument is in the genuine handwriting of the said H. W. de Forest, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said R. A. C. Smith.

H. G. HINTON,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 29th day of July, 1887, before me personally appeared Richard A. Elmer, president of the American Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the city of New York; that he is the president of the American Surety Company of New York; that he
57 knew the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as president of said company by like authority, and the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881; and the said Richard A. Elmer further said that he is acquainted with Fred. F. Nugent and knew him to be the secretary of said company; that the signature of the said Fred.

F. Nugent subscribed to the said instrument is in the genuine handwriting of the said Fred. F. Nugent, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Richard A. Elmer.

H. G. HINTON,
[L. S.] *Notary Public, Kings Co., N. Y.*

Cert. filed in N. Y. Co.

At a meeting of the board of directors of the American Surety Company, held at the office of the company on the 9th day of June, 1886. on motion, it was—

"Resolved, That in pursuance of chapter 416, Laws of 1886, amending section eight hundred and eleven of the Code of Civil Procedure, the president or vice-president be, and either of them are hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the company, and to attach thereto the seal of the company, the same to be attested by the secretary or assistant secretary."

58 CITY AND COUNTY OF NEW YORK, *ss:*

I, Fred. F. Nugent, secretary of the American Surety Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

[L. S.] Given under my hand and the seal of the company, at the city of New York, this 29th day of July, 1887.

FRED. F. NUGENT, *Secretary.*

59 Circuit Court of the United States, Southern District of New York.

LA COMPANIA BILBAINA DE NAV-ACION DE BILBAO, Libellant and Appellant,
vs.
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE Spanish-American Light and Power Company, Consolidated, Respondent and Appellant.

THE SAME, Respondent and Appellee,
ads.
THE SAME, Libellant and Appellant.

There is nothing to add to the opinion of the learned district judge. The findings sufficiently show upon what theory his decision is affirmed. As both sides have appealed, no costs of this court are allowed to either party.

E. HENRY LACOMBE.

60 (Endorsed:) Circuit court of the United States, southern district of New York. La Compania Bilbaina Navegacion

de Bilbao, libellant and appellant, *vs.* The Spanish-American Light and Power Company and The Spanish-American Light and Power Company, Consolidated, respondent and appellant. The Same, respondent and appellee, *ads.* The Same, libellant and appellant. Opinion. Lacombe, J. U. S. circuit court. Filed Oct. 15, 1888. John A. Shields, clerk.

61 Circuit Court of the United States, Southern District of New York. In Admiralty.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO, Libellant and Appellant,
against
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE Spanish-American Light and Power Company, Consolidated, Respondent and Appellant.

THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE Spanish-American Light and Power Company, Consolidated, Libellant and Appellant,
against
LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO, Respondent and Appellee.

Findings of Fact.

First. On December 19, 1885, the Spanish-American Light and Power Company, Consolidated, by the signatures of its president and secretary, executed a charter party of the S. S. "Marzo," owned by La Compania Bilbaina de Navegacion de Bilbao.

Second. Said charter party contained three clauses, as follows, viz:

11. "That the charterers shall have the option of contin-
62 uing the charter for a further period of twelve months on giving notice thereof to owners thirty days previous to first-named term and to have the liberty of subletting the steamer if required by them."

12. "That in the event of loss of time from deficiency of men or stores, break down of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, and should she in consequence put into any other port than that to which she is bound, the port charges and pilotages at such port shall be borne by the steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention shall be at the charterers' risk and expense."

18. "Should steamer be employed in tropical waters during the term of said charter party, steamer is to — docked, and bottom cleaned and painted, if charterers think necessary, at least once in every six months, and payment of the hire to be suspended until she is again

in a proper state for service. Charterers to have the privilege of shipping petroleum in bulk in water-ballast tanks, which are to be fitted for the purpose at owners' expense, satisfactory to charterers, and have permission to appoint a supercargo at their expense, who shall accompany steamer and be furnished free of charge, with first-class accommodations, and see that voyages are made with utmost dispatch."

63 Third. The negotiations preliminary to the signing of said charter party were conducted by Henry P. Booth, acting as broker for the said The Spanish-American Light and Power Company, and William W. Hurlbut, acting as broker for La Compania Bilbaina de Navegacion de Bilbao, and was signed by said Hurlbut as agent for said last-named company.

Fourth. Prior to said signature Hurlbut stated to Booth that he had no authority from his principals, the owners of the ship, to give the option of continuance set forth in clause 11, or to agree to the insertion in clause 18 of the words "at owners' expense," or to agree upon behalf of the owners that they would pay any part of the expense of fitting water-ballast tanks for carrying oil in bulk.

Fifth. Thereupon said Hurlbut signed the charter party and wrote a memorandum to the effect that the charter party was signed subject to the approval of the owners as to those two clauses. He at that time again announced to Booth his want of authority to incorporate those clauses, and that a copy of the memorandum should be sent with the copies of the charter to be furnished to Booth, as broker, for delivery to the charterers.

Sixth. Prior to the time of the signature aforesaid Hurlbut had not in fact received from his principals any authority to bind them to a contract containing these clauses.

64 Seventh. Upon being notified of the action of Hurlbut in signing a charter party containing these clauses they refused to ratify his action in that regard.

Eighth. The authority of Booth, the charterers' agent, was limited to securing the execution of a charter containing these clauses.

Ninth. Subsequently and on February 18, 1886, the "Marzo" arrived at Philadelphia and was at or about that time delivered to the Spanish-American Company.

Tenth. At the time of such delivery her owners supposed that the company was receiving her with the intention of fitting up the tanks at its expense, and the Spanish-American Company supposed that the owners were delivering her in accordance with the terms of the charter party which it had signed.

Eleventh. Upon her receipt and on or about February 21, 1886, the Spanish-American Company loaded and dispatched her on a voyage to Cuba and returned to Philadelphia, at which latter port the vessel again arrived on or about March 18th. The Spanish Company again loaded her; she proceeded to Cuba and thence to Boston, arriving at the latter port early in May.

Twelfth. Thereupon the Spanish Company notified the ship's agents, Messrs. Latasa & Co., that it was prepared to ship oil in bulk

and should expect the steamer to be put in proper condition as to tanks, etc., to receive it.

65 Thirteenth. Discussion thereupon arose between the ship's agents and the manager (Smith) of the Spanish Company, the latter demanding that the owners should fit the tanks at their expense and the owners expressing an entire willingness to fit the tanks, but refusing to pay the expense, which correspondence resulted in the following agreement, viz:

"It is hereby mutually agreed by and between the owners and the charterers of the steamship Marxo that the said vessel shall proceed to load oil and coal for Havana, Cuba, pending the settlement of matters in dispute between said owners and charterers, and that said loading shall not prejudice the claim of either party to said charter party.

"(Signed) R. A. C. SMITH, *Sec'y.*

"New York, May 26th, 1886."

And that a further arrangement was made by which $1,500 was paid by the charterers on account of the vessel's hire that had already fallen due.

Fourteenth. Upon return of the vessel to Philadelphia the Spanish Company again renewed the demand that the tanks should be fitted by the owners at their expense and refusing to pay hire until it was done and the owners, through the ship's agents, again refused to pay the expense, but expressing an entire willingness to fit the tanks at the expense of the Spanish Company. Much correspondence ensued, but finally the owners, after notifying the Spanish Company that they would be held for the expense, to avoid fur-

66 ther delay, proceeded to fit the tanks under the supervision of the engineer appointed by said company. The fitting was completed on July 30 and on that day the Spanish Company were notified that as soon as the bills for the expense thereof were received they would be presented to it for payment. They were so presented a few days later, amounting in the aggregate to the sum of $5,520.97, but the said company refused to pay the same.

Fifteenth. The sum of six hundred and seventy-five pounds, British sterling, per calendar month, payable monthly in advance, was a fair and reasonable consideration for the use of said steamer during the time she was actually used by the said Spanish Company.

Sixteenth. The said company has paid the owners of the "Marzo" for the use of said steamship at the said rate for said time during which she was so used, except the sum of eighteen hundred dollars, which was due May 21st, 1886.

Conclusions of Law.

First. The charter party signed December 18th, 1885, was not a valid contract, because the agent of the owners had no authority to agree to the disputed clauses and his action in signing a charter

party with such clauses contained in it was never ratified by said owners.

Second. The Spanish-American Company never executed
67 a charter party with those clauses omitted nor ever authorized any one to execute such a charter party in their behalf.

Third. The owners of the steamer never agreed with the Spanish Company that they would fit up the tanks at their own expense.

Fourth. The Spanish Company never agreed with the owners that they would pay for the expense which might be incurred in fitting up the tanks.

Fifth. For the actual use of the vessel which, with the assent of the owners, the Spanish Company has enjoyed it should pay a fair and reasonable rent.

Sixth. The libel and cross-libel should therefore be each dismissed, except as respects the hire unpaid (eighteen hundred dollars, with interest from May 21st, 1886) for the time of the actual use of the vessel by the Spanish Company.

Seventh. The decision of the district court is affirmed without costs of this court.

E. HENRY LACOMBE,
Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In admiralty. La Compania Bilbaina de Navegacion de Bilboa, libellant and appellant, *vs.* The Spanish-American Light
68 and Power Company *et al.*, respondent- and appellant-. The Spanish-American Light and Power Company *et al.*, libellant- and appellant-, *vs.* La Compania Bilbaina de Navegacion de Bilbao, respondent and appellee. Findings of fact and conclusions of law. U. S. circuit court. Filed Oct. 15, 1888. John A. Shields, clerk.

69 Circuit Court of U. S., So. Dist. of N. Y.

LA COMPANIA BILBAINA DE NAVIGACION, &c.,
vs.
THE SPANISH-AMERICAN LIGHT AND POWER CO., &c.

The "findings of fact" already found are complete and sufficient. To add to them would be to state the evidence rather than to find the facts. Still, if claimant desires a more elaborate statement, he may prepare the parts marked (in red) A, B, E, F, G, H, J, K, L, M as supplemental findings, which may be submitted for signature. The parts marked C, D, E′, F′, G′ are refused.

Dec. 24, '88.

E. H. LACOMBE.

(Endorsed:) Circuit court of the United States, southern district of New York. La Compania Bilbiana de Nav-acion, &c., *vs.*
70 The Spanish-American Light & Power Co., &c. Memorandum decision. Lacombe, J. U.S. circuit court. Filed Dec. 24, 1888. John A. Shields, clerk.

71 Circuit Court of the United States, Southern District of New York. In Admiralty.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBOA, Libellant and Appellant,
against
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE Spanish-American Light and Power Company, Consolidated, Respondent and Appellant,

and

THE SPANISH-AMERICAN LIGHT AND POWER COMPANY and THE Spanish-American Light and Power Company, Consolidated, Libellant and Appellant,
against
LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO, Respondent and Appellee.

Supplemental Findings of Fact.

In addition to the findings of fact heretofore found in the above-entitled causes in admiralty and filed therein on the 15th day of October, 1888, on motion of Whitehead, Parker and Dexter, proctors for La Compania Bilbaina de Navegacion de Bilbao, and after argument by the advocates of the respective parties, the court finds the following supplemental findings of fact, viz:

72 First. That the fourth of said original findings be, and the same is, amended by adding at the end thereof the following: "And that he would not sign the charter party containing the said clause 11 and said words 'at owners' expense' until authorized by the owners, his principals; that he, Hurlbut, would cable for authority, or he would sign the charter party with that clause and those words therein upon the condition that the said clause and words were not to be binding upon the owners of the vessel until approved by the said owners; that Booth thereupon agreed to said proposal made by Hurlbut.

That thereupon said charter party, containing said clause and words "at owners' expense," was taken by Booth to the office of the Spanish-American Light and Power Company, and was there signed by its president and secretary and manager, and was brought back to Hurlbut's office by Booth.

Second. Insert after the eighth original finding the following:

(B.) Immediately after the signature of the charter party, on December 19th, Hurlbut made a clean copy of the memorandum agreement, as follows, viz:

"NEW YORK, *December 19th*, 1885.

"Spanish-American Light and Power Company, charterers S. S. 'Marzo':

"SIRS: I have signed charter party by authority contained in the cables received.

"Should the two clauses, viz: 'Privileges of twelve months'
73 extension,' and the 'fitting of ballast tanks for petroleum at owners' expense,' be not accepted by owners it is understood that the same may be arranged or compromised by mutual consent by cable.

"Yours truly, W. W. HURLBUT."

And on the following Monday enclosed three copies of the charter party, with copy of said memorandum attached, and sent same to Mr. Booth, the broker of the charterers, with the following letter, viz:

"NEW YORK, *December* 21*st*, 1885.

"Messrs. James E. Ward & Co.

"DEAR SIRS: I enclose three certified copies charter party S. S. 'Marzo;' also letter for charterers to accept, covering the two conditions inserted in charter party as understood on signing same.

Yours truly, W. W. HURLBUT."

These were received by Booth.

(C.) That on the 11th January, 1886, Hurlbut sent to Booth information that he had received a letter, dated December 31, 1885, from the London brokers, as follows: "Owners refused to give option continuation which was asked them. We cabled you this: owners only gave liberty to carry petroleum in ballast tanks; they never agreed to 'fitted at their own expense.' We are really sorry you put them in charty party without authority. Owners are certain to pitch into us;" and that he had also received cable information that the steamship "Marzo" was about leaving Bilbao for the United States.

74 (D.) That on January 4th, 1886, the owners of the steamship (La Compania Bilbaina de Navegacion de Bilbao), having received copies of the charter party, wrote to Messrs. Walker, Donald & Taylor, the London brokers, as follows, viz:

"BILBAO, *January 4th*, 1886.

"DEAR SIRS: We are in receipt of your favor of the 23rd and 31st ulto. and 1st inst. enclosing charter party for the 'Marzo' S. S. As we are completely ignorant of this time-charter business, being the first time that we fix any one of our boats in this way, we are not decided until we see clearly and experience what there may be left to prolong the T. C. for another 12 months. If we see, and this will be soon seen, that things go all right, etc., it is probable that we shall agree to it and even be disposed to fix any other of our boats if you can then place her, but for the present we regret not to be able to agree to the option of twelve months more, nor can we admit that the cost for fitting the water-ballast tanks for carrying oil (petroleum) should be at steamer's expense, as we only, when accepting the terms of the charter, authorized the shipper to carry petroleum in water-ballast tanks, even (? never) thinking that besides our yielding to that condition they would ask us to spend

money for it. As for the supercargo, we agree to give him a first-cabin accommodation gratis on board, but he shall have to pay to the steward of the boat the food, as we do for the officers and crew.

'Marzo' is now here in dry-dock and loads end of this week
75 for Baltimore.

"Yours truly, AZNAR Y ASTIGARRAGA."

Endorsement on margin: "If delivery is accepted Baltimore, to whom must boat be delivered there, or whom Philadelphia or New York? Please wire before steamer leaves this port. As agreed, we suppose payment shall be made in London one month in advance."

(E.) That on January 9th, 1886, said Walker, Donald and Taylor transmitted a copy of said letter to Hurlbut at New York, and the latter, on January 18th, enclosed copy to Booth, the broker for charterers.

Third. In lieu of the ninth original finding substitute the following, viz:

Ninth. That the steamship "Marzo" sailed from Bilbao on January 15th, 1886, for Philadelphia, where she duly arrived, and on the 18th of February was tendered to the charterers, who accepted her as in their service under the charter from the date of February 21st, 1886.

Fourth. That the charterers, after acceptance of the vessel on Feb. 21st, loaded and despatched her to Cuba and return to Philadelphia, at which latter port she arrived about March 18th, 1886.

Fifth. That upon her arrival at Philadelphia Smith, the manager of the charterers, went over to Philadelphia, and for the first time stated to the master of the vessel that it was possible something would be required to be done towards fitting the tanks
76 for petroleum on the voyage next after the one for which she was loading, to which the master replied that he must be notified in time, because the owners understood the fitting of the tanks would be at the cost of the charterers, to which Smith replied, "That will be arranged."

Sixth. The vessel then for the second time proceeded to Cuba and loaded thence for Boston, arriving at the latter port early in May; that while the vessel was still in Boston the charterers wrote to the agents of the vessel at New York as follows:

"NEW YORK, *May 13th*, 1886.

"Messrs. Latasa & Co., city.

"GENTLEMEN: We learn from the captain of the 'Marzo' that he will complete his discharge at Boston to-day and that he will reach here to-morrow. We beg to again call your attention to the fact that we are now prepared to ship oil in bulk, and we shall expect the steamer to be put in proper condition to receive it this trip. We will gladly give you all the assistance we possibly can to hurry forward the work, for we do not wish the steamer to be unnecessarily detained any more than you do.

"Yours very truly, R. A. C. SMITH, *Sec'y*."

And on May 17th, 1886, again wrote as follows:

"NEW YORK, *May 17th*, 1886.

"Messrs. Latasa & Co., agents for owners of S. S. 'Marzo.'

77 "DEAR SIRS: Please take notice that we are prepared to ship oil in bulk, in the water-ballast tanks of the steamship 'Marzo,' and that, according to the terms of the charter party, same are to be fitted up for the purpose, at owners' expense, satisfactory to us. Until said tanks are put in the condition contemplated by said charter party the payment of the hire of the vessel ceases.

"Yours very truly, R. A. C. SMITH, *Sec'y*."

And also informed Latasa & Co. by another letter of the "appointment of an engineer to supervise the fitting of the tanks."

Seventh. That the letter of May 17th, above recited, was the very first intimation given to the owners, agents, brokers, or master of the steamship by the charterers that the latter had not accepted the refusal of the owners to confirm the words "at owners' expense," inserted in the charter party by Hurlbut without authority, as above recited.

Eighth. Add at the end of the fourteenth original finding the following: Or any portion of the hire remaining unpaid, which hire amounts to the further sum of $5,108.97, and have ever since refused to do so.

Ninth. Add at the end of the original sixteenth finding the words following: But has not paid any hire for the time employed in fitting the tanks, viz., from July 3rd to August 3d, 1886.

E. HENRY LACOMBE.

78 (Endorsed:) Circuit court of the United States, southern district of New York. La Compania Bilbaina de Navegaceon de Bilbao, libellant & appellant and respondent and appellee, *vs.* & *ads.* The Spanish Am. Lt. & Power Company and The Span. Am. Lt. & P. Co., Consolidated, respondent & appellee & appellant and libellant. Supplemental findings of fact. U. S. circuit court. Filed Jan. 14, 1889. John A. Shields, clerk.

78½ At a stated term of the circuit court of the United States for the second circuit and southern district of New York, held at the U. S. court-rooms, in the P. O. building, in the city of New York, on the eighth day of March, 1889.

Present: Hon. E. Henry Lacombe, circuit judge.

Appeal from the decree of the district court of the United States in and for said district. In admiralty.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO, Libellant & Appellant,
vs.
THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, Respondent and Appell't.

Final Decree.

This case came on to be heard upon the apostles and the additional proofs filed in this court on appeal, and was argued by
79 James Parker, Esq., advocate for the libellant and appellant, and by George W. Wingate, Esq., advocate for the respondent, and the court having duly advised thereon, it is now, on motion of Whitehead, Parker & Dexter, proctors for the libellant and appellant—

Ordered, adjudged, and decreed that the libel of the said Spanish-American Light and Power Company, Consolidated, be dismissed without costs of this court to either party.

It is further ordered, adjudged, and decreed that the said libellant and appellant, La Compania Bilbaina de Navegacion de Bilbao, do have and recover against the respondent and appellant, The Spanish-American Light and Power Company, and its stipulator, The American Surety Company, its damages and costs of the district court, amounting to the sum of two thousand and twelve $\frac{78}{100}$
80 dollars, and the further sum of one hundred and eighty-five $\frac{27}{100}$ dollars, interest thereon, being a total of two thousand one hundred and ninety-eight dollars ($2,198.00).

It is further ordered, adjudged, and decreed that unless this decree be satisfied or proceedings thereunder be stayed by appeal within the time and in the manner provided by law and the rules and practice of this court the libellant have execution to enforce the same.

E. HENRY LACOMBE.

Consent to the form and amount of the above is hereby given.
WINGATE & CULLEN,
Proctors for Respondent.

(Endorsed:) Circuit court of the United States, southern
81 district of New York. La Compania Bilbaina de Navegacion de Bilbao, lib'l't, ag't The Spanish-American Light and Power Company, Consolidated, respondent. Final decree. Whitehead, Parker & Dexter, proctors for libellants, 71 Wall street, New York. Service of a copy of within is acknowledged. N. Y., M'ch 8, 1889. U. S. circuit court. Filed Mar. 8, 1889. John A. Shields, clerk.

82 Supreme Court of the United States.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO, Libellant & Appellant,
against
THE SPANISH-AMERICAN LIGHT & POWER COMPANY, Consolidated, Respondent & Appellee.

To the honorable the Supreme Court of the United States of America:

The appeal of La Compania de Navegacion de Bilbao, the above-named libellant and appellant, respectfully showeth that on the twenty-second day of August, 1886, the above-named libellant, La Compania, &c., filed its libel in the district court of the *of the* United States for the southern district of New York against The Spanish-American Light & Power Company, Consolidated, in a cause civil and maritime, for the recovery of damages as in said libel set forth and demanded, amounting to the sum of ten thousand six hundred and twenty-nine and $\frac{11}{100}$ ($10,629.11) dol-
83 lars, besides interest, and on the 23rd day of September, 1886, the said Spanish-American Light & Power Company, Consolidated, appeared and filed its answer to said libel, and such proceedings were had in said cause that on the 21st day of June, 1887, a final decree was made and pronounced therein by the said district court wherein it was in substance adjudged that the said libellant recover against the said respondent the sum of one thousand nine hundred and seventeen ($1,917) dollars, together with ninety-five and $\frac{73}{100}$ ($95.73) dollars, costs of said district court.

And that after such final decree your petitioner and said respondent hath duly appealed therefrom to the circuit court of the United States for the southern district of New York, and said cause was removed thereby into said circuit court and there tried anew, and such proceedings were had in said circuit court that afterwards, on the eight- day of March, 1889, the said circuit court made a final decree in said cause, whereby it was decreed that the said decree of the district court be in all respects affirmed without costs
84 to either party of the circuit court, and that this appellant have judgment in the sum of two thousand one hundred and two $\frac{27}{100}$ dollars and for the costs of said district court, amounting to the further sum of ninety-five $\frac{73}{100}$ dollars, and for the costs of the said district court, amounting to the further sum of ninety-five $\frac{73}{100}$ dollars, and that the stipulators of the respondent cause their stipulations to be fulfilled, which final decree of said circuit court is, as this appellant is advised, erroneous and ought to be revised so as to give to appellant a decree according to the prayer of said libel in the sum of five thousand five hundred and twenty and $\frac{97}{100}$ ($5,520.97) dollars, with interest from August 4th, 1886, and in the further sum of one thousand eight hundred ($1,800) dollars, and interest from May 21st, 1886, and in the further sum of three thousand three hundred ($3,300) dollars, and interest thereon from June 21st, 1886, and in the further sum of eight and $\frac{14}{100}$ ($8.14) dollars, and interest from July 21st, 1886.

Wherefore this appellant appeals from the whole of said
85 decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of the said circuit court and the libel, answer, pleadings, findings of the circuit court, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed and a decree made according to the prayer of the said libel, with costs, or such other decree as to the said Supreme Court shall seem just.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO.
WHITEHEAD, PARKER & DEXTER,
Proctors for Libellants & Appellants.

Dated New York, March 22, 1889.
JAMES PARKER, *Advocate.*

The foregoing appeal is hereby allowed.
N. Y., May 7th, 1889.
E. HENRY LACOMBE,
Circuit Judge.

86 Service of a copy of the foregoing petition of appeal is acknowledged this 14th day of May, 1889.
WINGATE & CULLEN,
Proctors for Respondent.

(Endorsed:) U. S. circuit court, southern district of New York. La Compania Bilbania de Navegacion de Bilbao, libellant & appellant, against The Spanish-American Light & Power Company, Consolidated, respondent & appellee. The petition of appeal to the Supreme Court of the United States. Whitehead, Parker & Dexter, proctors for appellant, 71 Wall street, New York. U. S. circuit court. Filed May 15th, 1889. John A. Shields.

87 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit. In Admiralty.

La Compania Bilbania de Navegacion de Bilbao, Libellant & Appellant, *vs.* The Spanish-American Light and Power Company, Consolidated, Respondent & Appellee.	Bond for Damages and Costs.

Know all men by these presents that we, La Compania Bilbania de Navegacion de Bilbao and James Parker and Stanley W. Dexter, are held and firmly bound unto the above-named appellees in the sum of two hundred and fifty dollars, to be paid to the said appellees; for the payment of which, well and truly to be made, we

bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirtieth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named appellant- shall prosecute their appeal to effect and answer all damages and costs if the said appellant fail to make its said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LA COMPANIA BILBANIA DE NAVEGACION DE BILBAO, [SEAL.]
By JAMES PARKER, *Att'y-in-Fact.*
JAMES PARKER. [SEAL.]
STANLEY W. DEXTER. [SEAL.]

Sealed and delivered and taken and acknowledged this 2d day of April, 1889, before me—

THOMAS F. MURTHA,
[SEAL.] *Notary Public, New York Co.*

88 [Endorsed:] U. S. circuit court, southern district of New York. La Compania Bilbania, &c., libellant & appellant, *vs.* The Spanish-American L. & Power Co., Con., respond't and appellee. In admiralty. Bond for costs on appeal. The within bond is approved as to form, amount, and the sufficiency of the sureties. N. Y., May 6, 1889. E. Henry Lacombe. U. S. circuit court. Filed May 7, 1889. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } 88:

James Parker and Stanley W. Dexter, being duly sworn, doth depose and say each for himself that he is worth the sum of two hundred dollars over and above all his just debts and liabilities.

JAMES PARKER.
STANLEY W. DEXTER.

Sworn to this second day of April, A. D. 1889, before me—

THOMAS F. MURTHA,
[SEAL.] *Notary Public, New York Co.*

89 *Citation.*

By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To the Spanish-American Light and Power Company, Consolidated:

Whereas La Compania Bilbania de Navegacion, de Bilbao, libellant, has lately appealed to the Supreme Court of the United States

from a decree lately rendered in the circuit court of the United States — of New York, in the second circuit, in favor of the said libellant and appellant and against you as respondent, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the 2d Monday of October, 1889, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 7th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

E. HENRY LACOMBE,
Circuit Judge.

90 Service of a copy of the above citation is acknowledged this 14th day of May, 1889.

WINGATE & CULLEN,
Proctors for Respondent.

(Endorsed:) U. S. Supreme Court. La Compania Bilbaina de Navegacion de Bilbao, libellant & appellant, against The Spanish-American Light & Power Company, Consolidated, respondent & appellee. The citation. Whitehead, Parker & Dexter, proctors for appellant, 71 Wall street, New York. U. S. circuit court. Filed May 15, 1889. John A. Shields, clerk.

91 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to ninety, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of La Compania Bilbaina de Navegacion de Bilbao, libellant & appellant, against The Spanish-American Light and Power Company, Consolidated, respondent & appellee, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the said United States the one hundred and fourteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 13,601. S. New York C. C. U. S. No. 66. La Compania Bilbaina de Navegacion, de Bilbao, appellant, *vs.* The Spanish-American Light and Power Company, Consolidated. Filed August 12, 1889.

146 U S 483

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 66.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO, Appellant,

vs.

THE SPANISH-AMERICAN LIGHT AND POWER COMPANY, CONSOLIDATED, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

JAMES PARKER,

OF COUNSEL.

Supreme Court of the United States.

OCTOBER TERM, 1892.

La Compañia Bilbaina de Navegacion de Bilbao, Appellant, *vs.* The Spanish-American Light and Power Company, Consolidated, Appellee.	Term No. 66.

Appeal from the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT.

Statement of Facts.

On August 27, 1886, the said Appellant exhibited its Libel in admiralty in the District Court of the United States for the Southern District of New York, against the Appellee *in personam*, for the recovery of damages for breach of a charter party of the S. S. "Marzo" (copy of which is attached to the Libel), which damages, as claimed, amounted in all to the sum of $10,629.11. besides interest, as is in said Libel more particularly stated (Record folios 1-17).

The Appellee duly appeared, answered, and filed a Cross-Libel demanding damages in the sum of $12,474, for breach of the same charter party.

In due course trial was had; and the District Court entered a decree in favor of the Appellant, against the Appellee, for the sum of $2,012.73 damages, interest and costs; and the Cross-Libel of the Appellee was dismissed with costs to the Appellant (folios 42, 43).

From the decree in favor of the Appellant both parties appealed to the Circuit Court of the United States for the said district; and from

the decree dismissing the Cross-Libel the Appellee herein appealed to said Court.

The Circuit Court affirmed the decrees of the District Court, and made certain "*Findings of Fact*" (which will be found on pp. 31, 32, 33 of the Record herein). Upon motion, certain "Supplemental Findings of Fact" were made (these will be found on pp. 35, 36, 37, 38 of the Record). As amended by the "Supplemental Findings" the Circuit Court made the following

"Findings of Fact."

First. (Folio 61.) On December 19, 1885, the "Spanish-American Light and Power Company, Consolidated," by the signatures of its president and secretary, executed a charter party of the S. S. "Marzo," owned by "La Compañia Bilbaina de Navegacion de Bilbao." (For full copy of the charter party see p. 7 *et seq.* of the Record herein.)

Second. (Folio 62.) Said charter-party contained three clauses, as follows, viz.:

11. "That the charterers shall have the option of continuing the "charter for a further period of twelve months on giving notice "thereof to owners thirty days previous to (expiration of) first named "term, and to have the privilege of sub-letting the steamer if required "by them."

12 "That in the event of loss of time from deficiency of men or "stores, break down of machinery, or damage preventing the work-"ing of the vessel for more than twenty-four working hours, the "payment of hire shall cease until she be again in an efficient state "to resume her service; and should she in consequence put into any "other port than that to which she is bound, the port charges and "pilotages at such port shall be borne by the steamer's owner; but "should the vessel be driven into port or to anchorage by stress of "weather, or from any accident to the cargo, such detention "shall be at the charterer's risk and expense."

18. "Should steamer be employed in tropical waters during the "term of said charter party, steamer is to be docked and bottom "cleaned and painted, if charterer thinks necessary, at least once in "every six months, and payment of the hire to be suspended until "she is again in a proper state of service.

"Charterers to have the privilege of shipping petroleum in water "ballast tanks, which are to be fitted for the purpose at owners expense, "satisfactory to charterers, and have permission to appoint a super-"cargo at their expense, who shall accompany steamer, and be fur-"nished free of charge with first class accommodations, and see that "voyages are made with utmost dispatch."

Third (Folio 63). The negotiations preliminary to the signing of the Charter party were conducted by Henry P. Booth, acting as broker for the Spanish-American Light and Power Company, and William W. Hurlbut, acting as broker for La Compania Bilbaina &c., and it was signed by said Hurlbut as agent of the said last named Company.

Fourth (Folio 63.) Prior to said signature Hurlbut stated to Booth

that he had no authority from his principals, the owners of the ship, to give the option of continuance set forth in Clause 11, or to agree to the insertion in Clause 18 of the words "at owners' expense," or to agree upon behalf of the owners that they would pay any part of the expense of fitting water ballast tanks for carrying oil in bulk (Folio 72), and that he would not sign the charter party containing said clause 11, and said words "at owners' expense" until authorized by the owners, his principals; that he, Hurlbut, would cable for authority, or he would sign the charter party with that clause and those words therein upon the condition that the said clause and words were not to be binding upon the owners of the vessel until approved by said owners; that Booth thereupon *agreed to said proposal made by Hurlbut.*

That thereupon said charter party, containing said Clause 11 and words "at owners' expense," was taken by Booth to the office of the Spanish-American Light and Power Company, and was there signed by its President and Secretary and Manager, and was brought back to Hurlbut's office by Booth.

Fifth (Folio 63). Thereupon said Hurlbut signed the charter party, and wrote a memorandum to the effect that the charter party was signed subject to the approval of those two clauses. He at that time again announced to Booth his want of authority to incorporate those clauses; and that a copy of the memorandum should be sent with the copies of the charter to be furnished to Booth, as broker, for delivery to the charterers (Folio 63).

Sixth (Folio 64). Prior to the time of the signature aforesaid Hurlbut had not in fact received from his principals any authority to bind them to a contract containing these clauses (Folio 63).

Seventh. (Folio 64) Upon being notified of the action of Hurlbut, in signing a charter party containing these clauses, they (the owners) refused to satisfy his action in that regard (Folio 64).

Eighth (Folio 64).—The authority of Booth, the charterers' agent, was limited to the securing the execution of a charter containing those clauses.

B. (Folio 72.)—Immediately after the signature of the charter party, viz., December 19th, Hurlbut made a clean copy of the memorandum agreement, as follows, viz.:

"NEW YORK, December 19th, 1875.

"SPANISH-AMERICAN LIGHT AND POWER COMPANY,
"Charterers S. S. 'Marzo.'

"*Sirs:* I have signed charter party by authority contained in the "cables received. Should the two clauses, viz., Privilege of twelve "months' extension, and the fitting of ballast tanks for petroleum at "owners' expense, be not accepted by owners, it is understood that the "same may be arranged or compromised by mutual consent by cable.

"Yours truly,

"W. W. HURLBUT."

and on the following Monday enclosed three copies of the charter party, with copy of said memorandum attached, and sent same

to Mr. Booth, the broker of the charterer, with the following letter, viz.:

"NEW Y , December 21st, 1885.

"Messrs. JAMES E. WARD & Co.

"*Dear Sirs:* I enclose three certified copies charter party S. S "'Marzo,' also letter for charterers to accept, covering the two con- "ditions inserted in charter party as understood on signing same.

"Yours truly,

"W. W. HURLBUT."

These were received by Booth.

C. (Folio 73.)—That on the 11th January, 1886, Hurlbut sent to Booth information that he had received a letter dated December 31, 1885, from the London brokers, as follows: "Owners refused to "give option continuation which was asked them. We cabled you "this: Owners only gave liberty to carry petroleum in ballast tanks, "they never agreed to 'fitted at their own expense.' We are really "sorry you put them in charter party without authority. Owners "are certain to pitch into us;" and that he had also received cable information that the "Marzo" was about leaving Bilbao for the United States.

D. (Folio 74.)—That on January 4th, 1886, the owners of the steamship (La Compania Bilbania, etc.), having received copies of the charter party, wrote to Messrs. Walker, Donald & Taylor, the London brokers, as follows, viz.:

"BILBAO, January 4th, 1886.

"*Dear Sirs:* We are in receipt of your favor of the 23d and 31st "ulto. and 1st inst., enclosing charter party for the 'Marzo' S. S. "As we are completely ignorant of this time charter business, we are "not decided until we see clearly, and experience what there may be "left to prolong the T. C. [time charter] for another twelve months "If we see, and this will be soon seen, that things go all right, etc, "it is probable that we shall agree to it, and even be disposed to fix "any other of our boats, if you can then place her, but for the pres- "ent we regret not to be able to agree to the option of twelve months "more; nor can we admit that the cost for fitting the water ballast "tanks for carrying oil [petroleum] should be at steamer's expense, as "we only, when accepting the terms of the charter, authorized the "shippers to carry petroleum in water ballast tanks, even [? never] "thinking that besides our yielding to that condition they would ask "us to spend money for it. As for the supercargo, we agree to "give him a first cabin accommodation *gratis* on board, but he shall "have to pay to the steward the food, as we do for the officers and "crew. 'Marzo' is now here in dry dock, and loads end of this week "for Baltimore. Yours truly,

"AGNAR & ASTIGARRAGA,"

Endorsement on margin: "If delivery is accepted Baltimore, to whom must boat be delivered there, or whom, Philadelphia or New York? Please wire before steamer leaves port. As agreed, we suppose payment shall be made in London one month in advance."

E. (Folio 75.)—That on January 9, 1886, said Walker, Donald &

Taylor transmitted a copy of said letter to Hurlbut at New York; and the latter, on January 18th, enclosed copy to Booth, the broker for charterers.

Ninth (Folio 75).—That the steamship "Marzo" sailed from Balbao on January 15, 1886, for Philadelphia, where she duly arrived, and, on the 18th of February, was tendered to the charterers, who accepted her as in their service under the charter from the date of February 21st, 1886.

(Folio 76.)—That the charterer, after acceptance of the vessel on February 24, loaded and dispatched her to Cuba, and return to Philadelphia, at which latter port she arrived about March 18th, 1886.

That upon her arrival at Philadelphia, Smith, the manager of the charterer, went over to Philadelphia, and, for the first time, stated to the Master of the vessel that it was possible something would be required to be done towards fitting the tanks for petroleum on the voyage next after the one for which she was loading, to which the Master replied that he must be notified in time, because the owners understood the fitting of the tanks would be at the cost of the charterers, to which Smith replied, "That will be arranged."

The vessel then, for the second time, proceeded to Cuba, and loaded thence for Boston, arriving at the latter port early in May; and while the vessel was still in Boston, the charterer wrote to the agents of the vessel at New York as follows, viz.:

"New York, May 13th, 1886.

"Messrs Latasa & Co., City.

"*Gentlemen:* We learn from the Captain of the 'Marzo' that he "will complete his discharge at Boston to day, and that he will reach "here to-morrow. We beg to again call your attention to the fact "that we are now prepared to ship oil in bulk, and we shall expect "the steamer to be put in proper condition to receive it this trip. We "will gladly give you all the assistance we possibly can to hurry for-"ward the work, for we do not wish the steamer unnecessarily de-"tained any more than you do.

"Yours very truly,

"R. A. C. Smith, Secretary."

and on May 17th, 1886, again wrote as follows:

"New York, May 17th, 1886.

(Folio 77.)

"Messrs. Latasa & Co., Agents for Owners of S. S. 'Marzo.'

"*D ar Sirs:* Please take notice that we are prepared to ship oil in "bulk, in the water ballast tanks of the steamship 'Marzo,' and that, "according to the terms of the charter-party, same are to be fitted up "at owners' expense satisfactory to us. Until said tanks are put in the "condition contemplated by said charter-party, the payment of the "hire of the vessel ceases.

"Yours very truly,

"R. A. C. Smith, Secretary."

and also informed Latasa & Co., by another letter, of the "appoint-"ment of an engineer to supervise the fitting of the tanks."

That the letter of May 17th above recited, was the very first intimation given to the owners, agents, brokers or Master of the steamship by the charterer that the latter had not accepted the refusal of the owners to confirm the words, "at owners' expense," inserted in the charter party by Hurlbut, without authority, as above recited. (Folios 76, 77.)

Tenth (Folio 64).—At the time of such delivery her owners supposed that the company was receiving her with the intention of fitting up the tanks at its expense; and the Spanish-American Company supposed that the owners were delivering her in accordance with the terms of the charter-party which it had signed.

(The eleventh and twelfth findings are dropped out here, as being mere repetitions of what is stated more fully in the Ninth supplemental finding as above inserted.)

Thirteenth. (Folio 65.) Discussion thereupon arose between the ship's agents and the manager (Smith) of the Spanish Company, the latter demanding that the owners should fit the tanks at their own expense, and the owners expressing an entire willingness to fit the tanks, but refusing to pay the expense, which correspondence resulted in the following agreement, viz.:

"It is hereby mutually agreed by and between the owners and char-
"terer of the steamship "Marzo" that said vessel shall proceed to
"load oil and coal for Havana, Cuba, pending the settlement of mat-
"ters in dispute between said owners and charterer, and that said
"loading shall not prejudice the claim of either party to said charter
"party. R. A. C. SMITH, Sec'y.
"NEW YORK, May 26, 1866."

And a further agreement was made by which $1,500 was paid by the charterer on account of the vessel's hire that had already fallen due.

Fourteenth. (Folio 56.) Upon return of the vessel to Philadelphia the Spanish Company again renewed the demand that the tanks should be fitted by the owners at their expense, and refusing to pay hire until it was done; and the owners, through the ship's agents, again refused to pay the expense, but expressing an entire willingness to fit the tanks at the expense of the Spanish Company. Much correspondence ensued, but finally, the owners, after notifying the company that they would be held for the expense, to avoid further delay, proceeded to fit the tanks, under the supervision of the engineer appointed by said company. The fitting was completed on July 30; and on that day the Spanish Company were notified that as soon as the bills for the expense thereof were received they would be presented to it for payment. They were so presented a few days later, amounting in the aggregate to the sum of $5,520.97, but the said company refused to pay the same (folio 77) or any portion of the hire remaining unpaid, which hire amounts to the further sum of $5,108.97, and have ever since refused to do so.

Fifteenth. (Folio 66.) Th sum of six hundred and seventy-five pounds, British sterling, per calendar month, payable monthly in advance, was a fair and reasonable consideration for the use of the said

steamer during the time she was actually used by the said Spanish Company.

Sixteenth. (Folio 66.) The said company has paid the owners of the "Marzo" for the use of said steamship at the said rate for said time during which she was so used, except the sum of eighteen hundred dollars which was due May 21, 1886 (folio 77), but has not paid any hire for the time employed in fitting the tanks, viz., from July 3 to August 3, 1886.

Upon the above Findings of Fact the Circuit Court decreed that the libellant and appellant (La Compania, etc.,) was only entitled to recover $1,800 as a fair and reasonable rent (*sic.*) (hire) for the time of the actual use of the vessel by the Spanish American Company (folio 67, of Record,) and a decree was entered for that amount with interest, amounting in all to the sum of $2,198 (folios 79, 80).

No appeal from this decree was taken to this Court by the Appellee. Nor did the Appellee appeal to this Court from the decree of the Circuit Court dismissing its Cross-libel.

The Libellant, "La Compania, etc.," appealed to this Court upon the grounds stated in the Petition of Appeal (folios 82, 85), that the decree of the Circuit Court was erroneous, in that the Appellant was entitled to recover (according to the prayer of the libel):

1. The sum of $5,520 $\frac{97}{100}$ (the cost of fitting the water ballast tanks) and interest from August 4, 1886.
2. The sum of $1,800 and interest from May 21, 1886.
3. The sum of $3,300 and interest from June 21, 1886, and
4. The sum of $8 $\frac{14}{100}$ and interest from July 21, 1886.

The last three items being on account of unpaid hire and interest. Whereas said Court had only granted a decree for the second of said items and interest.

Argument.

The argument before this Court will properly be confined to the question of the right of the Appellant to recover.

1st. The amount expended by it in fitting the tanks at the demand and under supervision of an engineer appointed by the Appellee, viz.: the sum of $5,520 $\frac{97}{100}$.

2d. The amount of the hire of the vessel for the period during which the fitting of the tanks was being done, viz.: the sum of $3,300.

As preliminary to the discussion of these, it will be proper to take some notice of the theory upon which the Courts below seem to have proceeded; and which is stated in the first "Conclusion of Law," as follows (fol. 66):

"The charter party, signed December 19th, 1885, *was not a valid* "*contract*, because the agent of the owners had no authority to agree "to the disputed clauses; and his action in signing a charter party "with those clauses contained in it was never ratified by said owners."

His Honor, the District Judge, in his opinion (folio 38), thus states it:

"The written charter party, signed by the broker of the libellants, "did not constitute a legal contract binding upon either of the "parties, because in signing it the broker exceeded his authority; and "that fact was communicated at the time to the broker of the "respondents."

It would seem to be new law to assert that because, as in this case, an agent has authority to make a contract for twelve months, as Mr. Hurlbut unquestionably had, he says to the agent, who desires for his principal an option of a continuance, "I have no au- "thority to grant such an option, but we will insert it in the contract "subject to the approval of my principal, and it is not to be con- "sidered as binding upon them until they do approve it," that the *whole* of the contract, which is otherwise binding, is thereby invalidated; and the same holds good as to any other stipulation inserted in the contract, under similar agreement.

If this be law, what becomes of the whole doctrine of conditional contracts?

Would a deed made by an agent, under power of attorney authorizing him to convey five pieces of property belonging to the principal, be invalid because the agent, without authority, inserted a clause conveying a sixth? Would not any Court hold to the contrary, and that, as to the five, concerning which the agent *had* authority, the conveyance was a valid deed?

Neither of the learned Judges below gives any authority for the proposition, and they differ in the reasons assigned.

It is nevertheless a fact that (as to everything else in the charter-party, except the Clause 11 and words 'at owners' expense') both parties, from the time the charter party was signed, until it was thrown up by the charterer under the option of cancellation given in Clause 11, both before and after the Libel and Cross-libel were filed, acted upon and under it, and treated it as their obligatory contract.

The Appellant filed its Libel. and the Appellee its Cross-libel, both claiming damages for a breach of this contract of charter. Neither side was content with the view of the charter-party upon which the District Court based its decrees; both appealed to the Circuit Court, and demanded, before that Court, the damages for breach of the contract which had been denied in the District Court.

At all times, under all circumstances, in everything except as to the question as to who should pay the expenses of fitting the tanks, and in respect to the hire for the time during which they were being fitted, both parties felt themselves bound by, and acted upon the charter; and regarded, and treated it as their contract.

No question ever arose as to the option given by Clause 11 of a continuance, because, before the first twelve months had elapsed, the imposition of the differential duties therein referred to put an end to the charter. The charterer exercised the option given by that clause, and cancelled it; thus, in its very last act, recognizing it as its contract.

POINTS.

I.

A contract should be supported and not nullified; and Courts of law will not overthrow a contract, if upon any reasonable consideration it may be maintained.

"A contract should be supported rather than defeated." 2 *Parsons on Contracts*, p. 15.

"And if a charter will bear a double construction, and, in one sense it can effect its purposes, and in the other not, it will receive the construction which will make it efficacious."—*Idem*, * p. 17.

If a contract admits of two constructions, one of which will "render it inefficacious, or nullify it, that construction should be adopted "which will carry it into effect. For there is no presumption against "the validity of contracts.

"Nor can we suppose that parties sit down to make a contract providing for a particular event, when that very event would make it void." *Brown* vs. *Slater*, 16 Conn., 192.

"The desire of the law to effectuate rather than defeat a contract is "*wise, just* and *beneficial*."—2 *Parsons on Contracts*, * p. 18.

"Even a contract in restraint of trade, if divisible, may be held "void as to part of its stipulations, and valid as to part." Bradley, *Justice*, in *Oregon St. Nav. Co.* vs. *Winsor*, 20 Wall., 64–72.

A man and wife conveyed in fee, a piece of land, which was described by metes and bounds and contained ten acres; and, on the same day, made a second conveyance of another piece of land adjoining. This last deed contained an exception of an acre of the *ten* acre lot conveyed by the other deed, on which acre stood a house and lot.

Held—Bronson, *Ch. J.*—"That the exception, not being for a part "of the thing granted, was void." *Cornell* vs. *Todd*, 2 Denio, * 130; N. Y. Com. L. R., 128. The whole deed was not declared void, simply because a part of it was.

II.

A contract may consist of several contemporaneous agreements, some of which may impose conditions not stated in the main instrument.

This is elementary law, and it would seem almost absurd to cite, before this high tribunal, authorities to sustain it.

Says Parsons: "If there are contemporaneous writings between "the same parties, so far in relation to the same subject-matter that

" they may be claimed as part and parcel of the contract, *though not* re-
" ferred to in it, they may be read in connection with it." *2 Parsons on Contracts*, * p. 66 and cases cited.

" The contract may be contained in several instruments which, if
" made at the same time, between the same parties, and in relation to
" the same subject, will be held to constitute but one contract, and the
" Court will read them in such order of priority as will carry into
" effect the intention of the parties, as the same may be gathered from
" all the instruments taken together. And the recitals in each may
" be explained or corrected by a reference to any other in the same
" way as if they were only parts of one instrument." 2 *Parsons on Contracts*, * p. 15 and cases cited.

Jones on Commercial Contracts, § 157 *et seq.*

Upon the facts as found we maintain, therefore:

III.

That the agreement made by Booth, as the agent of the Charterer, with Hurlbut, the Agent of the owners, that the words " at owners' expense " should be inserted in the Charter subject to approval of the owners, was the act of the Charterer.

" The Third Finding (Folio 63) clearly shows that "The negotiations
" preliminary to the signing of the Charter party were conducted by
" Booth acting as broker for the Spanish-American Light and Power
" Company." The Fourth Finding, (Folio 63) shows that after the agreement as to the consent of the owners was made, Booth took the Charter to his principal, and brought it back with its signature attached; and it is otherwise shown that Hurlbut, the Agent of the owners, dealt only with Booth, the Agent for the Charterer, and never with the latter directly. The Spanish company confided its interests to the care of its Agent, Booth.

" The representations, declarations, admissions and even conceal-
" ment of an agent, constituting a part of the *res gestae*, and being
" the inducement to the contract, and made at the same time, are
" binding upon the principal." *Story on Contracts*, § 135a; *Story on Agency*, 135.

" Notice to an agent, in respect to the subject matter of his agency,
" is considered as notice to the principal. So also knowledge acquired
" by an agent in the course of business is the knowledge of his
" principal." *Story on Contracts*, 136.

IV.

The knowledge of Booth, the agent, that it had been agreed that the words "at owners' expense" should be inserted subject to the approval of the owners, was the knowledge of Booth's principal.

Suppose the findings of facts to show that Booth had gone to his principal, and informed it that he had made this agreement, which the Circuit Court finds he *did* make, and that those words "at owners' expense" had been inserted subject to the approval of the owners; and that Hurlbut had signed the Charter party as agent for the owners only "*upon the condition that said words were not to be "binding upon the owners of the vessel until approved by said "owners*"; (Folio 72), can there be any doubt, that silence on the part of Booth's principal would be held to be a ratification of his action? I do not believe the learned counsel for the Appellee will maintain to the contrary.

Story on Agency, § 140 says: "Notice of facts to an agent is con- "structive notice to the principal himself when it arises from or is "at the time connected with the subject matter of his agency; for "upon general principles of public policy, it is *presumed that the "agent has communicated such facts to his principal;* and *if he "has not, still the principal, having entrusted the agent with the "particular business, the other party has a right to deem his acts and "knowledge obligatory upon the principal; otherwise the neglect of "the agent, whether designed or undesigned, might operate most "injuriously to the rights and enterests of such party.*"

So that whether or not Booth communicated the fact to his principal, that he had made such an agreement with Hurlbut, is *absolutely of no consequence in this case.* The law *presumes that he did*; and makes *his* knowledge that of the Charterer.

V.

The authority of Booth, as Agent for the Charterer, was a continuing authority; and did not cease or become revoked so long as anything remained to be done in and about the completion of the Charter; that is, until the action of the owners in reference to the clauses that had been inserted subject to their approval was made known to him.

Story on Agency, § 470, says, concerning revocation of an agency: "It takes effect from the time, as to third parties, when it is made "known to them, and not before. Until, therefore, the revocation is

" so made known, it is in operation. As to third parties who are ignor-
" ant of its revocation, his (the agent's) acts bind both himself and
" his principal."

Well may the learned writer characterize this rule, thus laid down, as " clear, comprehensive and just."

In the case of

Townsend vs. *Chappell*, 79 U. S., 681–686 (20 L. Ed., 436), this Court said : " The inference to be drawn is that everything fairly
" within the scope of the powers exercised in the past may be done
" in the future until notice of the revocation or disclaimer is brought
" home to those whose interests are concerned."

In *Hatch* vs. *Coddington*, 96 U. S., 45–58 (24 L. Ed., 339), one Rice was authorized by resolution, adopted July 13, 1858, by a railway company, to borrow money and pledge certain bonds. Rice had deposited these bonds with Coddington, April 20th, 1859, as security in a contract for iron for the road. It was claimed by the road that Rice's authority had been revoked by resolutions of January 23d, and February 3d, 1859. There was no evidence that any knowledge of these last resolutions had been communicated to Coddington. When he accepted the pledge of the bonds, the resolution of July 13, 1858, (Rice's authority,) had been shown to him. This Court held :

" On its face, it was a continuing authority, on which he (Codding-
" ton) had a right to rely until notified of its revocation. Persons who
" deal with an agent before notice of the recall of his powers are not
" affected by the recall." 2 Kent's Com., 644 n.

In the case of

Southern Life Ins. Co. vs. *McCain*, 96 U. S., 84 (24 L. Ed., 653), this Court held :

(Mr. Justice Field): "After a company has appointed an agent for a
" particular business, parties dealing with him in that business have a
" right to rely upon the continuance of his authority until, in some
" way, informed of its revocation. The authorities to this effect are
" numerous. *Story on Agency*, §§ 470, 471. The law is equally plain
" that special instructions limiting the authority of a general
" agent must be communicated to the party with whom he deals.
" *Good faith requires that the principal should be held by the acts of*
" *one whom he publicly clothed with apparent authority to bind him.*
" *Story on Agency*, §§ 126, 127."

Johnson vs. *Christian*, 128 U. S., 374 (31 L. Ed., 820; and 32 L. Ed., 412). In this case there was a claim that a former agency had been revoked and that it no longer continued ; but this Court said :

" No act of contract of his (the agent) was disavowed by her (the

" principal) to the appellees, with whom, as her agent, he was dealing, " and from whom he was collecting payments in her behalf.

" Not being notified of revocation of his authority as her agent, " they were clearly justified in acting upon the presumption of its " continuance."

The findings of facts show (folio 72): That before Booth took the charter-party to his principal, he and Hurlbut clearly agreed that Clause 11, and those words "at owners' expense" were to be inserted " upon the condition that the said Clause and words were not to be bind- " ing upon the owners of the vessel until affirmed by the said owners." " That thereupon the charter party containing said Clause 11 and " words 'at owners' expense' was taken by Booth to the office of the " Spanish Company, and was there signed by its officers, and brought " back to Hurlbut's office by Booth," and (Folio 73) was *afterward* signed by Hurlbut.

There is not a word in the findings of fact to show that Booth gave Hurlbut any reason to believe that he had concealed from his principal the agreement he had made, or that Hurlbut was ever informed that there was any limitation of Booth's agency in any manner, or to any extent, in respect to the charter-party.

As before shown, *the law presumes that he told the officers of the company*; and whether he did or not is entirely immaterial to the issue of this cause.

VI.

The notice given by Hurlbut, the owners' agent, to Booth, the charterer's agent, that the owners had refused their assent to that clause 11 and the words " at owners' expense," by delivering to him on January 18, 1886, a copy of the letter from said owners, dated January 4th, was notice to Booth's principal, the Spanish Company; and delivery of the letter to Booth was delivery to his said principal.

This proposition is amply sustained by the authorities cited under Point IV. (*Ante*).

VII.

The acceptance of the vessel by the charterer at Philadelphia, on February 21, 1886 (more than a month after the owners' refusal to assent had been communicated to it through its agent, Booth), was a ratification of Booth's acts; and bound the charterer to the contract as made by him.

If the acts which the findings of fact show, done by this Spanish-American Company, do not amount to a ratification of the acts of their agent, it would be difficult to frame a statement of any series of acts that would.

If the charterer had actual knowledge, viz.: if Booth, when he took the charter party to the office of his principal, had said to its officers, "I have agreed that Clause 11 and those words 'at owners' expense' "shall not be binding upon the owners until approved by them;" and those officers had then signed the charter, can there be any doubt that their company would be bound by Booth's agreement? But the law, says Justice Story, "*presumes that he did tell them.*" If, when Booth received, on January 18th, the letter from the owners of January 4th, refusing assent to Hurlbut's action in these two particulars, he had immediately communicated its contents, either by sending the letter or verbally or in writing, to the Spanish-American Company, can there be doubt that the company would have been required by good faith to say that it would not accept the ship, on arrival at Philadelphia, if it did not intend to abide by the charter without these two clauses being in it?

Yet the law *presumes* that Booth made the communication of the owners' dissent.

And then more than a month later, with this knowledge of Booth's act, and of the owners' action in respect to those clauses, on February 18th the ship is taken into the service of the charterer without a word being said; she is used for a voyage without a word being said; and then when the fitting of the tanks is referred to by Smith, the manager, and the master of the ship (Folio 76) reminds him that the fitting of the tanks would be at the cost of the charterer, Smith replies evasively, "That will be arranged." Look, too, at the subsequent conduct of the charterers' manager. In his first letter of May 13, 1886, (Folio 76,) he says nothing about the expense; and it was not until the letter of May 17th (Folio 77) that, as the Seventh Finding shows, the charterer made any demand upon the owners that the expense of fitting the tanks should be borne by the owners; and then, too, for the first time the proposition was made that not only must the owners pay that expense, but must lose the hire of the vessel during the whole time employed in the fitting, although the latter was to be done under the control and supervision of the engineer employed by the charterer for that purpose.

The Thirteenth and Fourteenth Findings show that these owners, from the beginning to the end of the matter, were always perfectly willing to comply with their part of the contract, as made by the two agents, Booth and Hurlbut; and that they finally fitted the tanks and

sent the bill therefor, amounting to $5,520.92, to the charterer for payment. As this expense was a lien upon the ship, the owners, of course, had to pay and did pay it; and this libel was filed to compel the latter to reimburse the owners.

VIII.

Clause 18 of the contract of charter grants to the charterer the "privilege of shipping petroleum in bulk in water ballast tanks," and gives to the charterer the privilege of having them fitted for the purpose "to the satisfaction of the charterer," but at the expense of the latter.

That this expense should be paid by the Charterer is shown by two considerations:

1. The Charterer deemed the insertion of the words "*at owners' expense*" necessary to be inserted in order that the owners should be bound to pay it. It is a rule of common sense that, if any one desires to avail himself of a mere privilege such as this was, that person would properly expect to be chargeable with any expense connected with such use; and it was to rid itself of the obligation of the rule that made the charterer desire to insert those words.

2. If the Charterer did not intend to pay this expense, it should have refused to accept the vessel, when tendered, as it was with full knowledge on its part, through its agent, that the owners had refused to agree that such fittings should be at their expense.

Good faith, in my opinion, required us to do what we have done, viz.—fit the tanks, to the charterers' satisfaction, and call upon them to pay the expense, which good faith required them to pay.

Only three courses were legally open to us.

1st. To refuse to fit the tanks and permit the vessel to lie idle, until such time as the Charterers choose to agree to pay the expense; and sue them meanwhile for hire at expiration of each month;

2d. We might have re-chartered the ship, and sued the charterers for any difference. This would have involved a breach of charter on our part.

3d. Or we might have fitted the tanks, and sued the charterers for the cost.

We chose this last, which was what the highest good faith required. We had agreed that the tanks might be used for petroleum; they could not be so used without being fitted for the purpose.

IX.

The owners are entitled to the hire of the vessel during the time occupied in fitting the tanks.

The contract determines the various contingencies which are to operate to relieve the Charterer from payment of hire. These contingencies are all stated in Clause 12 of the Charter party (Folio 15). and are: (*a*) Deficiency of men or stores; (*b*) break down of machinery, or (*c*) damage preventing the working of the vessel for more than twenty-four hours; and, by the 18th clause, during the time lost in docking and painting the steamer, no hire is to be paid.

These are absolutely all the contingencies which are to cause suspension of payment of the hire.

Whatever else these parties agreed, or failed to agree upon, it is certainly true that the owners never agreed, nor did any one else ever agree for them, that, during the time required to fit the tanks, the hire should cease. That it should so cease, was certainly not contemplated by the charterer's officers when they signed the charter party, because, although they wished the clause relative to the expense of fitting the tanks to be inserted, they said nothing about loss of hire in that connection.

The causes for which payment of hire by the charterer is to be suspended are all carefully stated; and time lost in fitting the tanks is not one of them. Not being mentioned, it is excluded.

"*Expressio unius est exclusio alterius.*"

The charterer's manager, Smith, when on the 13th May he made the first written demand for the fitting of the tanks, said nothing about the loss of hire. That was reserved for the letter of May 17th, and was the threat by which he hoped to force these owners into doing what he knew they had always refused to do; and to put upon them the alternative of losing a charter deemed valuable, or of complying with his wishes.

In this state of affairs the owner had a right to do what it did do, viz., fit the tanks and hold the charterer for the expense of it.

X.

There should be a decree for the Appellant for the cost of the fitting of the tanks, viz., the sum of $5,520.97, and interest from August 1, 1886; and for the whole amount of the hire due, viz., the sum of $5,108.97 with interest, as demanded in the libel; and for costs of all courts.

JAMES PARKER,
Of Counsel for Appellant.

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In this state of affairs the owner had a right to do what it did do, viz., fit the tanks and hold the charterer for the expense of it.

X.

There should be a decree for the Appellant for the cost of the fitting of the tanks, viz., the sum of $5,520.97, and interest from August 1, 1886; and for the whole amount of the hire due, viz., the sum of $5,108.37 with interest, as demanded in the libel; and for costs of all courts.

JAMES PARKER,
Of Counsel for Appellant.

146 U.S. 483

Office Supreme Court U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

Term No. 66.

LA COMPANIA BILBAINA DE NAVEGACION DE BILBAO,
Appellant,

vs.

THE SPANISH-AMERICAN LIGHT AND POWER COMPANY (CONSOLIDATED).

BRIEF FOR RESPONDENT.

GEORGE W. WINGATE,
Of Counsel.

MARTIN B. BROWN, Printer and Stationer, 49 and 51 Park Place, N. Y.

Supreme Court of the United States.

La Compania Bilbaina de Navegacion de Bilbao, Appellant, *vs.* The Spanish-American Light and Power Company (Consolidated).	October Term, 1892. Term No. 66.

Points for Respondent.

FACTS.

The libellant appeals from a judgment of Mr. Justice Lacombe (Circuit Court for the Southern District of New York), affirming a decision of Mr. Justice Brown of the District Court of that district that the owners of the steamer "Marzo" were not entitled to recover from the respondent, her charterers, the cost of fitting up her tanks to carry oil in bulk nor her hire during the times such alterations were being made. The same decree dismissed the claim of the respondent for damages for delay in fitting up the tanks, but no appeal was taken by it to this Court.

In December, 1885, the Spanish-American Light and Power Company was engaged in shipping large quan-

tities of petroleum to Cuba, and was desirous of chartering a vessel which could carry this oil in bulk. It employed Henry P. Booth as a broker to charter the steamer "Marzo," by a charter which should provide:

1. That the charterer should have the option of continuing the charter for a further period of twelve months, on giving notice to the owners of thirty days, and

2. To have the privilege of shipping petroleum in bulk in water ballast tanks, which should be fitted up at the owners' expense, satisfactory to the charterers.

See Second and Eighth Findings, pp. 31, 32, fols. 62, 64.

The District Judge states in his opinion (p. 21, fol. 38), "from the first they refused the charter unless the the ship should be fitted up at the expense of the owners and that fact was stated to the owners brokers at the time."

The authority of Booth was limited to securing the execution of a contract containing these clauses.

Eighth Finding, p. 32, fol. 64.

The negotiations for the charter were conducted by Booth, as broker for the Spanish-American Company, and by William W. Hurlbut, as broker for the libellants, and was signed by Hurlbut as its agent.

Third Finding, p. 32, fol. 63.

Prior to the signing by Hurlbut, he stated to Booth that he had no authority from his principals (La Compania Bilbania) to give the option of continuance set forth in clause 11 (p. 8, fol. 15) or to agree upon behalf of the owners that they would pay any part of the expense of fitting water-ballast tanks for carrying oil in bulk.

Fourth Finding, p. 32, fol. 63.

And that he would not sign the charter-party containing these clauses until authorized by his principals. That he, Hurlbut, would cable for authority or would sign the charter-party with that clause and those words therein upon the condition that the said clause and words were not to be binding upon the owners of the vessel until approved by the owners; that Booth thereupon agreed to said proposal; that thereupon said charter-party, containing said clause, was taken by Booth to the office of the Spanish-American Company and was signed by its president and secretary and manager and was brought back to Hurlbut's office by Booth.

First Supplemental Finding, p. 35, fol. 72.

Thereupon Hurlbut signed the charter party and wrote a separate memorandum to the effect that it was signed subject to the approval of the owners as to these two clauses; at that time he again announced to Booth his want of authority to sign the paper with those clauses incorporated, and that a copy of the memorandum should be sent with the copies of the charter to be furnished to Booth, for delivery to the charterers.

Fifth Finding, p. 32, fol. 63.

This memorandum was as follows:

NEW YORK, December 19, 1885.

"Spanish-American Light and Power Company, char-
"terers S. S. 'Marzo':

"SIRS—I have signed charter-party by authority con-
"tained in the cables received. Should the two clauses
"viz.: 'privileges of twelve months' extension and the
"'fitting of ballast tanks for petroleum at owners' ex-
"'pense' be not accepted by owners, *it is understood*

" *that the same may be arranged or compromised by mu-*
" *tual consent* **by cable.**

" Your truly,

" W. W. HURLBUT."

—and inclosed three copies of the charter-party with copies of said memorandum attached and sent them to Booth with a letter stating that the letter for the charterers to accept covered the two conditions inserted in charter-party, as understood on signing same.

Second Supplemental Findings, p. 35, fols. 72 and 73.

On January 11, 1886, Hurlbut sent Booth information that he had received a letter dated December 31, 1885, from the London brokers, as follows :

" Owners refused to give option continuation which " was asked them. We cabled you this; owners " only give liberty to carry petroleum in ballast tanks; " they never agreed to 'fitted at their own expense,' " and that he had also received a cable that the steamer was about leaving for the United States. On January 4, 1886, the owners wrote the London brokers to the same effect.

See Supplemental Findings, C and D, p. 36, fol. 74.

On January 9, 1886, the London brokers transmitted a copy of this letter to Hurlbut, who on January 18 inclosed a copy to Booth.

See Supplemental Findings E, p. 37, fol. 75.

The "Marzo" sailed from Bilbao on January 15, 1886, for Philadelphia, where she arrived on February 18, and was tendered to the charterers, who accepted her as in their service on February 21, 1886.

Ninth Finding, p. 32, fol. 64.

Third Supplemental Finding, p. 37, fol. 75.

At the time of her delivery her owners supposed that the company was receiving her with the intention of fitting up the tanks at its expense, *and the Spanish-American Company supposed that the owners were delivering her in accordanee with the terms of the charter-party, which it had signed.*

Tenth Finding, p. 32, fol. 64.

Judge Brown (the District Judge) states in his opinion (p. 21, fol. 38): "Notice of this refusal was "given the charterers, *and they never consented to waive* "*these two clauses.* The agreement of the brokers was "that, upon such a difference, the matter should be "settled by negotiation; but it never was settled. "Neither side apparently wished to push the matter "to a settlement, *though each understood the difference.* "No agreement as to these two clauses was ever ar-"rived at, while both deemed them material. The "subsequent conduct of each shows that neither side "receded, or intended to recede, from its position. "When the vessel arrived, ready for the first voyage, "neither party made inquiry as to the disputed "clauses. The duty of inquiry rested upon each alike, "if they wished to have a fixed agreement. Both, in "fact, assented to the use of the ship on the first "voyage, without any definite agreement on the dis-"puted points and without the settlement by negotia-"tion that had been agreed upon by the brokers. "*The charterers did not object because they were not* "*ready to use tanks.*"

Upon receipt of the "Marzo," and about February 21, 1886, the Spanish-American Company loaded and dispatched her on a voyage to Cuba and back to Philadelphia where she arrived about March 18. She was again loaded and sent to Cuba and thence to Boston, where she arrived early in May.

Eleventh Finding, p. 32, fol. 64.

On the steamer's third arrival at Philadelphia, the manager of the charterers stated to his master that it was possible something would be required to be done towards fitting the tanks for petroleum on the next (third) voyage, to which the master replied *that he must be notified in time* because *the owners* understood the fitting of the tanks would be at the cost of the charterers, to which the manager replied "that (*i. e.*, the notice) will be arranged."

Fifth Supplemental Finding, p. 37, fol. 76.

On May 13, 1886, the charterers notified the agents that they were ready to ship oil in bulk, and expected the steamer to be put in condition to receive it at this trip; that they would be glad to give them all the assistance possible to hurry forward the work, as they did not wish the steamer to be unnecessarily detained.

Sixth Supplemental Finding, p. 37, fol. 76.

A discussion ensuing, on the 17th of May, 1886, the Spanish-American Company wrote again that they were prepared to ship oil in bulk in the water ballast tanks of the steamship "Marzo" and that, in accordance with the terms of the charter-party, the same were to be fitted up for the purpose, at owners' expense, satisfactory to us. "Until said tanks are put in condition by said charter-party, the payment of the hire of the vessel ceases."

Sixth Supplemental Finding, p. 38, fol. 77.

The letter of May 17 was the first intimation given to the owners, agents, brokers, or master of the steamship by the charterers that the latter had not accepted the refusal of the owners to confirm the words "at owners' expense," inserted in the charter-party by Hurlbut, the agent.

Seventh Supplemental Finding, p. 38, fol. 77.

Thereupon a discussion ensued between the agents of the two parties, *the latter demanding that the owners should fit the tanks at their expense*, and the owners expressing an entire willingness to fit the tanks, but refusing to pay the expense, which resulted in the agreement of May 26, 1886, that the vessel should proceed to load oil and coal for Havana, pending the settlement of matters in dispute between the parties without prejudice, and a further arrangement was made by which $1,500 was paid by the charterers on account of the vessel's hire that had already fallen due.

Thirteenth Finding, p. 33, fol. 65.

Upon the return of the vessel the respondents again renewed this demand and refused to pay hire until the tanks were fitted. The ship's agents again refused to pay the expense, but offered to fit up the vessel at the expense of the Spanish-American Company. More correspondence ensued, but finally the owners, after notifying the Spanish Company that they would be held for the expense, to avoid further delay, proceeded to fit the tanks, the bills for which amounted to $5,520.97, which was presented to the Spanish Company, who refused to pay it.

Fourteenth Finding, page 33, fol. 66.

In this connection Judge Brown says (Opinion, p. 21, fol. 39), " When the respondents were ready to use " the tanks and required the vessel to fit them up in " pursuance of the terms of the charter the libellants " refused to do so. The cargo was then taken in " barrels under a stipulation that that might be done " without prejudice to the rights of either, the respon- " dents claiming damages for the extra expenses. " Subsequently the owners fitted up the tanks, claim- " ing that the expenses would be at the charge of the " charterers, **while the latter notified the**

"owners that they would not pay for any "such expense." * * * And at page 22, fol. 39, "the charterers never agreed to accept the charter except with these stipulations *and gave prompt notice thereof and did nothing to mislead the owners.*" * * *

And again at p. 22, folios 39–40, "The owners' failure to notify the charterers directly for several weeks after the charter had been signed that they refused their assent to the two disputed clauses was irregular and perhaps somewhat negligent on their part, but I do not think that material in the result because the charterers were, I think, apprized of the verbal refusal of the owners to those terms. *Nevertheless, the vessel came to the charterers without further request by them, and was tendered to them by the owners without attempting any settlement of the disputed points.* Both alike consented to the first voyage without any settlement of these differences. It is certain, however, that as soon as any question was made between the master and the charterers about the tanks after the first voyage, the original refusal of the owners was made known to the respondents, and neither of the parties ever agreed to the demands of the other on the subject, without either side yielding anything to the other as to the charter the ship was employed, and neither side refused dealings as they might have done."

The alterations occupied from July 3 to August 3, 1886, and no hire for the period was paid by the respondents.

Ninth Supplemental Finding, p. 38, fol. 77.

Judge Brown held (Opinion, p. 22, fol. 40): "The terms of the charter must be deemed to constitute the implied agreement of the parties in the actual use of the ship in all except as to the disputed clauses. *Neither party can found any claim against the other upon the clauses that the other party did not accept, but always and consistently*

" *refused to accept, because in the face of such a refusal* " *no agreement as to them can be implied.* The owners, " therefore, can recover nothing for their expenditures " in fitting up the tanks to carry oil in bulk, nor " can the charterers by their cross libel recover any " damages for the tanks not being fitted up earlier. " For the same reason also the owners cannot recover " for any time of the vessel lost while they were fitting " up the tanks. They lose nothing by this disallow- " ance, because it does not appear that any more time " was required to fit up the tanks when the work was " actually done than would have been required when " the vessel was brought over to the charterers. * * * " The rights and liabilities of the parties are founded, " as I have said, not at all upon the written charter- " party, but wholly upon their subsequent conduct in " the actual use of the ship. The charter-party is ap- " plied by implication to these acts so far as it presump- " tively indicates the intention of both and no further. " *There can be no implied promise or obligation in contra-* " *diction of the expressed refusal of either.* The result is " that neither has any claim upon the other for the " damages set forth by them respectively."

Judge Brown's Opinion, p. 22, fol. 40.

The Circuit Court found as Conclusions of Law:

1st. That the charter-party was not a valid contract, because the agent of the owners had no authority to agree to the disputed clauses and his action in signing the charter-party with such clauses contained in it was never ratified by said owners.

2d. The Spanish-American Company never executed a charter-party with those clauses omitted, nor ever authorized any one to execute such a charter-party in their behalf.

3d. The owners of the steamer never agreed with the Spanish Company that they would fit up the tanks at their own expense.

4th. The Spanish Company never agreed with the owners that they would pay for the expense which might be incurred in fitting up the tanks.

See Conclusions of Law, pp. 33 and 34' fols. 66 and 67.

From this judgment the libellant appeals.

The charterers filed a cross libel for the loss of the use of the steamer, while these repairs were being made, which was also dismissed, and from which decision no appeal was taken.

Points.

FIRST—In no event is it possible for the owners of the steamer to recover from the charterers any portion of the expense incurred in fitting up its tanks to carry petroleum in bulk (which constitutes the principal portion of the decisions appealed from), and such claim was properly disallowed by the Courts below.

(*a*) Admitting, for the sake of the argument, the contention of the appellant's counsel that the acts of the parties resulted in rendering inoperative the clause contained in the charter providing that the ballast tanks should be fitted to carry oil in bulk at the owners' expense, yet constituted the charter-party a binding instrument in all other respects, there is nothing upon which to establish the slightest obligation on behalf of the charterers to *make such alteration, or to pay for it if made.*

There is no suggestion that anywhere during the correspondence or negotiation the charterers promised to make or pay for any such alterations. Upon the contrary, it appears that the latter invariably and persistently refused to recognize any such liability, and insisted that it was the exclusive duty of the owners to pay for them.

It therefore follows, that if the ship-owners choose to alter these tanks it was a voluntary act on their part in regard to repairs upon their own property, for which they have no remedy against the charterers.

(*b*) The responsibility of the Spanish-American Company for these repairs is asserted because it refused to retain or use the steamer unless the tanks were fitted up by the owners as provided in the charter, and it is contended that on this account an implied contract arose that if the owners did make them the charterers must bear the expense.

It is submitted, however, that no such contract can be implied in face of the finding, that the charterers "always and constantly refused" in any way to assume such expense, and only insisted that the alterations should be made *on the ground that it was the duty of the owners to make them.* In other words, they were so confident of their legal right under the charter to compel the owners to fit up these tanks that they were willing to risk the loss to be incurred from their not using the vessel, while the owners were so doubtful of their position that they were not willing to risk being held for damages if they refused.

(*c*) The action of the charterers is not alleged in the libel to constitute duress of any kind and did not do so in fact or in law.

There is no suggestion that the company was not pecuniarily responsible for the freight (although this

would have been immaterial). If it did not choose to use the vessel, the owners could have leased her for the charterers' account, and held them liable for any loss, or they might have let her lie idle and have sued the company for the freight as it became due (as they did in the present case).

(*d*) The proposition, at page 15 of the appellant's brief, that when the charterers refused to use the vessel the owners could either, 1. Sue for the hire monthly. 2. Charter the vessel for the charterers' account, or 3. *Fit up the tanks and sue the charterers for the cost*, is, as to the third proposition, entirely unprecedented.

The additions in question to the vessel must be assumed to have increased in value. Can it be contended that if their cost had been $50,000 instead of $5,000 that the owners would have been privileged because the charterers insisted that they should be made by the owners, for the latter to make the former bear the expense while they received the ultimate benefit in the value they added to their steamer?

(*e*) The suit is brought upon the charter-party as signed, which is made a part of the libel (p. 7, fol. 12), and is for the rent of £675 per month for the vessel fixed by that charter, besides a claim for the cost of fitting the oil tanks. The position of the appellants, therefore, is the utterly inconsistent one that, though the charter-party is a binding instrument on the appellees so far as relates to the hire of the vessel, it is utterly inefficacious against the appellants as to the provisions contained in subdivision 18 as to the water ballast tanks.

This is contrary to natural equity and certainly cannot receive countenance in an admiralty proceeding.

When an action is brought to enforce any part of a contract this necessarily implies an affirmation of it as

a whole and the plaintiff must stand upon the contract according to its terms.

A plaintiff cannot recover upon a contract, affirming it for one purpose and repudiate it for another.

He cannot recover upon it as binding upon the defendant and deny its obligations upon himself.

Byron *vs.* Low, 109 N. Y., 291, 296.

(*f*) The liability of the Spanish-American Company to pay for fitting up these water tanks, if it exists at all, must be found in some contractual relation between it and the appellant.

This must be either expressed or implied.

I.—It is very clear that there was no *express contract*, for the Spanish-American Company persistently refused to enter into such an one and the charter-party as executed indicated plainly their intention not to do so.

II.—The courts should not create an implied contract in such a case as this.

The *implication* of a contract between parties upon a subject *to which their attention has been directed* and which they have omitted to provide for by express stipulation, should not be made by a Court, except to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate an intention to effect.

King *vs.* Leighton, 100 N. Y., 386, 391.
See cases *infra.*

None of these conditions exist in this case.

I.—The Spanish-American Company expressly provided by their contract, solemnly entered into, that

the expense of fitting up the tanks should be borne by the owners.

II.—Nor did their conduct in any way mislead the appellant; they always insisted that the repairs should be at owners' expense and they were made with full knowledge of this contention.

III.—It is conceded that the Spanish-American Company only wanted a steamer that would be fitted to carry oil at the owners' expense, and that they wanted to close such a contract at once, and gave their broker no authority to make any other contract.

IV.—It is self-evident that no business man would have agreed to assume the expense of fitting the tanks of a steamer its officers had never seen, and whose construction was unknown.

SECOND—The Courts below were correct in holding that the charter never became a binding contract.

(*a*) The appellant's theory is substantially that while the Spanish-American Company bound itself by signing a charter containing a number of clauses, and by nothing else, that by virtue of a statement of the agent of the owners (to an agent of theirs whose authority was limited to securing the execution of that particular contract and no other) that such owners might not agree to two clauses and that if they did not, *it should be subject to negotiation* it made the instrument binding upon the persons who previously signed it, *with the exception of these particular clauses* if the owners dissented from them.

In other words, that this verbal statement was to have the same effect as if the written contract had been returned to the persons signing it, and the clauses in question had been erased.

Such a contention is opposed to all rules of law, civil or maritime. The instrument is to be taken as a whole, and if the minds of the parties have not met in regard to any part of it, it is a nullity not merely as to that part, but as to all its clauses.

In Eliason *vs.* Henshaw, 4 Wheat., 225, this Court held that an offer by one person to another imposes no obligation upon the former, unless it is accepted by the latter, according to the terms upon which the offer was made; any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the party who made it. This was a case where an offer was made to be accepted at Harper's Ferry which offer was accepted by letter delivered at Georgetown and there received by the plaintiff.

This case was cited and approved in Tilley *vs.* County of Cook, 105 U.S. Reports, p. 161, and Minneapolis Railway *vs.* Columbus Rolling Mill, 119 U. S. Reports, p. 151.

In the latter case, Mr. Justice Gray said: "No contract is complete without the mutual assent of the parties," * * * "So long as the offer has been neither accepted nor rejected, the negotation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer has been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotation, unless the party who made the original offer renews it, or assents to the modification suggested."

In Insurance Co. *vs.* Young's Administrator, 90 U. S. Reports (23 Wall.), p. 85, A applied to an insurance company for a policy upon certain terms. The company sent

one to the agent who countersigned the policy and on August 8 wrote A informing him that it had arrived and asking him whether he would send it or retain it to await his orders. A did not reply and on the 21st he was shot and died on the 21st of September. Held, "That, owing to the change in the policy from the "terms contemplated by A, the applicant, the accept- "ance by the company was a qualified acceptance "which A. was not bound to accept."

The Court said: "The applicant assented to the "proposition contained in the receipt, but the com- "pany did not. The company assented to the policy, "but the applicant never did. The mutual assent, "the meeting of the minds of both parties, is wanting. "*Such assent is vital to the existence of a contract. With-* "*out it there is none, and there can be none. In this case it* "*is not established by any direct proof, and there is none by* "*which it can be inferred.* This is not controverted. If it "be alleged there was fault on the part of the agent, for "which the company is responsible, in not communica- "ting promptly and fully with the applicant upon the "arrival of the policy, there are several answers to "the imputation. *Such fault, viewed in any light, can-* "*not be taken as the legal equivalent of the assent of the* "*applicant to the terms of the policy.* But no such fault "is shown. The applicant knew that the company was "not bound, and would not be bound until it chose to "become so, and that it had the right to do what it "did" (p. 107). * * * It does not appear that he "took any step whatever in this way. Neither "he nor his personal representative, therefore, had "any reason to complain. If he had received notice "of the proposition made through the policy it "would have been at his option to give or refuse "his assent. *He was certainly in no wise bound until* "*such assent was given. Until then, there could be no* "*contract on his part, and if there was none on his part*

"*there could be none on the part of the company. The* "*obligation in such cases is co-relative. If there is* "*none on one side there is none on the other. The* "*requisite assent must be the work of the parties* "*themselves. The law cannot supply it for them. That* "*is a function wholly beyond the sphere of judicial au-* "*thority*" (p. 107). * * *

"Even where the parties supposed they had agreed "and it turned out there was a misunderstanding as to "a material point, the requisite mutual assent as to "that point being wanting, it was held that neither "was bound."

(*c*) The delivery of the steamer to the Spanish-American Company, and her acceptance, did not constitute a hiring of her under the charter, with the disputed clauses omitted.

Hurlbut's memorandum was that if the owners did not agree to the insertion of the disputed clauses in the charter "they should be arrayed or compromised by mutual consent *by cable*" (p. 36, fol. 73).

This was December 19, 1855. The owners were apprised of this prior to December 31, as on that day they wrote to the London brokers, who *wrote* Hurlbut, who wrote Booth. On January 4 the owners *wrote* their London brokers who *wrote* Hurlbut January 9, who sent the letter to Booth January 19 (p. 35, 37, fols. 74, 75).

In spite of the authorities cited by the appellant, it is submitted that the libellants were bound to know that the agency of the broker employed to procure a charter of a particular vessel is a special and not a general one, and ceased when the charter he had been employed to secure had been executed (although this is not particularly material).

Crane *vs.* Evans, 1 State Rep., N. Y., 218.
General Interest Co. *vs.* Ruggles, 12 Wheat., 409.

Lowell Cent. Sav. Bank *vs.* Winchester, 8 Allen, 109.
Moore *vs.* Stone, 40 Iowa, 259.

Without communicating directly with the Spanish-American Company and without receiving any communication whatever from them, the steamer was dispatched to Philadelphia on January 19, and on the day of her arrival was tendered the charterers, without a single word being said as to the disputed clauses to the Spanish-American Company, who Judge Brown finds had been previously notified of the owners verbal dissent (p. 22, fol. 39).

This is the only finding, and is in effect that these letters were not delivered to it, and that they only knew vaguely that the owners objected. The failure to cable the delivery of the steamer without any attempt to negotiate, would naturally mean that the dissent was not insisted upon.

(*d*) It may well be contended that this unconditional delivery of the steamer was an express ratification of the charter as signed.

This was the only contract under which the Spanish-American Company had ever signified any desire to use the steamer. The notice of Hurlbut was that if the owners dissented, the matter "*should be compromised or arranged by mutual consent by cable.*"

It was, therefore, incumbent upon the owners, if they wished to avail themselves of this privilege, to comply with its provisions.

As a matter of law, it was the duty of the owners, if they dissented from the authority of their agent to make such a charter as he had signed, to promptly dissent from it.

The agent's acts were not void, but voidable.

Dinn *vs.* Wright, 1 Peters, C. C., 64.

A principal must dissent promptly if an agent has exceeded his authority.

Couzins *vs.* Bleecker, 12 Johns., 300.
Jarvis *vs.* Hoyt, 2 Hun, 637.
Armory *vs.* Hamilton, 17 Mass., 442.

Laches in delaying notice of dissent is a ratification.

Prince *vs.* Clark, 2 D. & R., 266; B. & Co., 186.

So held in regard to a charter.

Saviland *vs.* Green, 40 Wis., 431.

In the present case there was a peculiar necessity for promptness, as the owners knew it had been agreed that if they dissented it should be communicated by cable.

It was also clear to any business man that the Spanish-American Company would be obliged to make their business arrangements in regard to using the steamer and it was important to them to know promptly if the charter they had signed was binding.

It was therefore indispensable not only that the owners should apprise the charterers of their dissent by cable, but that before they delivered the steamer that they should have a distinct understanding *that they did not do so under the existing charter.*

In fact, no cable was sent and no attempt made to arrange the matter. No communication of any kind had been made by the Spanish-American Company to the owners or their agents, and they had in no way intimated any intention to accept any other charter than the one they signed.

In fact, they had no such intention and the Circuit Court expressly finds that they "accepted the steamer

in the belief that the owners were delivering her under the charter which they had signed."

Fourth Finding, p. 32, fol. 64.

When, therefore, the steamer was delivered to them by the captain without any objection or suggestion in regard to the disputed claims in the charter it was in law the adoption of the only contract that was in existence between the parties in regard to her, whether the owners so intended or not. It clearly was not, as contended in the applicant's brief, the acceptance of her under the charter, with the omission therefrom of the two clauses upon which the charterers had agreed to hire her.

If, with full knowledge of the facts, a person ratifies an agreement which another has improperly made concerning him or his property, he thereby makes himself a party thereto and without any new consideration.

Drakely *vs.* Gregg, 8 Wall., 242, 267.

The charterers had merely agreed to hire the vessel upon the written charter which they had signed. *This must be accepted by the owners as a whole, or repudiated as a whole.*

"The ratification must be of all; *the principal is not permitted to ratify in part and reject in part.*"

Cochran *vs.* Chetwood, 59 Ill., 53.
Wedner *vs.* Lane, 14 Mich., 124.

A ratification of a part of an unauthorized transaction of an agent is a confirmation of the whole.

Farmers' Loan & Trust Co. *vs.* Walworth, 1 N. Y., 433.
Ruder *vs.* Hull, 1 Hun, 409.

It will be observed that the captain of the "Marzo" said nothing upon this subject until after her return in March to Philadelphia *from her second voyage* for the Spanish-American Company, a month after her acceptance, and only then when the charterers had told him it was necessary to do something upon the next voyage to fit up her tanks to carry petroleum.

Fifth Supplemental Finding, p. 37, fol. 76.

Consequently, upon the delivery of the steamer by the captain, as above stated, without any objection or suggestion in regard to the charter and her acceptance by the Spanish-American Company under the charter which they had signed, there was in law an express waiver by the owners of the former objections to the charter, *no matter whether they had intended it or not.* This it also shown from the fact that the present action was founded upon that specific charter, whereas if the owners' assertions were correct it never had any validity.

There was no necessity of any affirmative action by the Spanish-American Company.

They had said throughout, "We stand on the charter; we will not accept the vessel except under it."

When the owners, after this, delivered the steamer to them without attempting to make any new agreement, it was an admission that they acceded to their contention, and were content that they should take her "as per charter-party."

"Ratification is presumed where the principal's acts are inconsistent with any other supposition, as where he receives and retains the fruits of the agents' acts."

Maddrix *vs.* Beavan, 39 Md., 485.
Balston Bk. *vs.* Maine Bk., 16 Wis., 120.

THIRD—The appellant is not entitled to claim the rent for the use of the steamer during the month she was under repair.

(*a*) As above shown, the appellee had only agreed to hire the vessel provided she should be fitted up at the owners' expense to carry petroleum in bulk.

This necessarily involved not only that the owners would pay the actual cost of fitting the tanks, but that if the vessel could not be used while such work was being done that they would bear the rent during that period. In other words, the expense of fitting up consisted of the cost of the repairs themselves, *and* the loss of the use of the ship during the time they were being made and the owners were to bear both. In fact, the expressions contained in the clause in the charter "tanks to be fitted at owners' expense" meant that such tanks should be fitted up *before the steamer was delivered* under the charter.

It is submitted that a contract would be a contradiction in terms if it provided that the owners would bear the expense of fitting up the vessel, yet allowed them to take their own time to do it, and yet collect full freight from the charterers during the time the work was going on although the latter would be deprived of the use of the vessel. This would involve the absurdity that if it took the owners *the whole time of the charter* to do the work they would receive the entire freight, although the vessel might not render any service during the whole period.

(*b*) The charterers having found that the owners claimed the contract to be different from the one on which alone they had accepted the vessel, refused to retain her, *or to pay for her use until she was fitted up as per charter-party.* She was thereupon delivered to the owners, *who accepted her*, and after having made the

alterations, thereafter returned her to the charterers, having held her for a month.

This acceptance and retention of the vessel stopped the running of the freight money under the charter.

If the owners wanted to collect their freight they should have left the vessel in the hands of the charterers.

(*c*) As above shown there was in fact no charter, the minds of the parties never having met upon these important clauses. The charter has no importance except as fixing the value of the use of the steamer Consequently the charterers can only be compelled to pay for the use of the vessel while she was in their service. She was not in such service during the month that her owners had her making these alterations.

(*d*) As above shown, the *laches* of the owners in failing to notify the Spanish-American Company directly of their dissent from the act of their agent in making the charter in question, and in delivering the steamer to them in silence after they had been informed that it would only accept the vessel under the charter which had been signed by Hurlbut was a ratification of the charter which rendered the same binding.

Consequently the libellants were bound to fit up these tanks at their own expense, and had no more right to recover freight during the period in which the vessel was useless, on account of their being altered, then they would have had to recover the expense of the alterations themselves.

FOURTH—The Courts below have treated the appellants most tenderly in holding that neither party was bound by the charter.

There was but one instrument that was in writing—either it bound both parties or neither. Its effect could only be avoided by showing:

(1) That its execution was unauthorized by one of the parties and the delivery of the steamer was made under a misapprehension, (2) that a new contract was agreed upon.

It is found as a fact that the first was the case, and that the latter was not.

In fact, there is not the slightest foundation upon which to base an assertion that the Spanish-American ever proposed or agreed to hire the steamer, without her tanks being fitted up and a clause for the extension of her charter. The contrary is expressly found to be the case. From the reasoning above stated the Courts below could well have held that the appellants were bound by the charter as it stood and therefore bound to refund to the appellees the losses they sustained by their inability to use the streamer to carry petroleum in bulk.

FIFTH—The judgment appealed from should be affirmed.

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